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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

LEMUEL SMITH,

Respondent.

PETITION AND APPENDIX FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YOK

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Question Presented

Does the New York statutory scheme providing for the mandatory imposition of the death penalty upon conviction of murder in the first degree for the intentional killing of another by a person then serving a minimum term of at least fifteen years to life upon a prior conviction offend the Constitution of the United States?

The Parties

The parties to the proceeding in the Court of Appeals of the State of New York were the People of the State of New York against Lemuel Smith. The State of New York appeared by the Attorney General on the issue of the constitutionality of the New York statute.

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IN THE

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OCTOBER TERM 1984

THE PEOPLE OF THE STATE OF NEW YORK,

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Citation to the Opinions Below

The opinion of the Court of Appeals of the State of New York is reported at——NY2d——, ——NYS2d——, —— NE2d —— (Appendix 1a).

The sentence of the trial court is unreported (Appendix 130a).

Jurisdiction

The order of the Court of Appeals of the State of New York is dated July 2, 1984.

The jurisdiction of this Court is invoked under 28 USC 1257.

Constitutional and Statutory Provisions

Constitution of the United States, Amendment VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"

Penal Law of the State of New York

§125.27 Murder in the first degree

A person is guilty of murder in the first degree when:

1. With intent to cause the death of another person, he causes the death of such person; and

(a) Either:

(i) the victim was a police officer as defined in subdivision 34 of section 1.20 of the criminal procedure law who was killed in the course of performing his official duties, and the defendant knew or reasonably should have known that the victim was a police officer; or

(ii) the victim was an employee of a state correctional institution or was an employee of a local correctional facility as defined in subdivision two of section forty of the correction law, who was killed in the course of performing his official duties,

and the defendant knew or reasonably should have known that the victim was an employee of a state correctional institution or a local correctional facility; or

(iii) at the time of the commission of the crime, the defendant was confined in a state correctional institution, or was otherwise in custody upon a sentence of the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the minimum of which was at last fifteen years and the maximum of which was natural life, or at the time of commission of the crime the defendant had escaped from such confinement or custody and had not yet been returned to such confinement or custody; and

(b) The defendant was more than eighteen years old at the time of the commission of the crime.

2. In any prosecution under subdivision one it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime except murder in the second degree; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, an-

other person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime except murder in the second degree.

Murder in the first degree is a class A-I felony.

§ 60.05. Authorized dispositions; class A, B, certain C and D felonies and multiple felony offenders

1. Class A felony. Every person convicted of a class A felony must be sentenced to imprisonment in accordance with section 70.00, unless such person is convicted of either murder in the first degree and is sentenced to death in accordance with section 60.06 or of a class A-III felony and is sentenced to probation in accordance with section 65.00.

§ 60.06. Authorized disposition; murder in the first degree

When a person is convicted of murder in the first degree as defined in section 125.27, the court shall sentence the defendant to death.

Facts

On May 15, 1981, the defendant Lemuel Smith, lured Correction Officer Donna Payant to the Catholic Chaplain's complex in the Greenhaven Correctional Facility* where he beat, strangled, bit and assaulted her causing her death. He then placed her body in plastic bags and threw her into a trash dumpster in the facility. At the time of the

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* A diagram of the facility, included in the opinion of the Court of Appeals is reproduced at A. 87a.

murder the defendant was serving five 25 years to life sentences.[1]

In May of 1981 the defendant was an inmate in the Greenhaven Correctional Facility serving the sentences indicated above. He was, ironically, a clerk or "porter" in the Catholic Chaplain's office, responsible for the cleanliness of the office, including disposal of the garbage.[2] In May of 1981, Father Donovan was away on leave and the defendant had been instructed to do minor painting in the bathroom during his absence. The Chaplain's office complex consisted of a front office, a back room or library-classroom, a hall connecting the two and a bathroom. There was a phone in the Chaplain's office which could call directly to any other phone in the institution and there was an instituional telephone directory in the office. The front door to the complex led out to an alcove off hospital corridor.

The standing instructions from the Chaplain were that his clerks were not to admit other people to the complex

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[1] At the time of the commission of the instant crime, the defendant was serving the following sentences:

a) Murder of Margaret Byron and Robert Hedderman—25 years to life, two counts concurrent and two counts consecutive.

b) Kidnapping and Robbery of Maryanne Maggio—25 years to life on each as a persistent felony offender to be served consecutive to previously imposed sentences.

c) Robbery of Margaret Byron and Robert Hedderman—12½ to 25 years.

d) Rape and Sodomy of Maryanne Maggio—10 to 20 years on a plea of guilty.

Additionally, two separate murder charges had been dismissed (Joan Richburg and Marilee Wilson) because no further punishment could be imposed.

[2] He was also a porter in the package room responsible for removing garbage from that location.

when he was not there. Further, if it was a correction officer who insisted on being present, the inmate was instructed to leave the office, because an inmate could not properly tell a correction officer to leave the office and Father Donovan did not want anyone in the office with his clerks when he was not there.

The evidence at trial indicated that the defendant would dump garbage at dumpsters at the "gate corridor", that his garbage containers were usually not checked, that he travelled unescorted through the institution to dump the garbage, and that he exited gate corridor to the dumpster area without supervision or accompaniment by a correction officer.

The defendant had a limited institutional pass which, while technically permitting him access to only one-half of the institution, nevertheless in practice appears to have caused the correction officers to acquiesce in his movement throughout the institution.

Donna Payant, a Correction Officer of the New York Department of Correctional Services, in May of 1981 was assigned to the Greenhaven Correctional Facility. She had graduated from the Academy a short time before. She was the wife of a correction officer and the mother of three children.

Some time between March and May of 1981, Donna while with Officer Hughes, was standing, waiting for the gate to be opened, with a group of inmates, including the defendant, Lemuel Smith. Donna commented about the religious carving that Smith was holding and the defendant told her that he could make her one and that he worked in the Chaplain's office.

On May 12, the defendant was seen standing in the alcove to the Chaplain's office when Donna entered the hospital corridor and walked past him. She stopped and turned

to the defendant. Later, Donna Payant and Lemuel Smith were seen exiting the Catholic Chaplain's office complex together. The defendant said Donna had asked to use the phone. Whether they in fact were discussing the purchase of a carving or carved item, or whether Smith had some other pretext for engaging Donna in conversation, they were, prior to May 15, speaking acquaintances and it appears that at least on this one occasion they had talked in the Chaplain's office complex.

On May 15, 1981, Donna punched in on her time card at 12:08. This was her first day back after two days off duty. She attended the line-up for the 1 to 9 p.m. shift and received her assignments, the same assignments she had had for the previous two weeks. Donna obtained the equipment required for the assignment, and then proceeded toward her first assignment.

Immediately following her (within a minute), Smith emerged from the direction of the package room and proceeded towards the Chaplain's office.

Donna, together with Officers King and Hinson, walked toward her assignment. On the way, Officer Hinson took a phone call on the corridor phone and was asked, "is Payant around". She gave the telephone to Donna. The Officer heard her say, "who, who". Donna was on the phone for about one minute, and after the conversation told Officer King that there was some sort of problem. The only voice that Officer Hinson ever said sounded more like the caller than other voices on the telephone was that of Lemuel Smith. At trial there was no identification of the voice.

On the day following the first anniversary of Donna's murder, the defendant, who was then in the exercise yard of the special housing unit at Downstate Correctional Facility, told another inmate, "He shouldn't never have made the phone call, that he deserved to die." Smith also told

him "This was on his mind for awhile, he was, like he was being driven and he couldn't help himself, that he had to do what he had to do."

After the telephone call Donna Payant headed for the hospital corridor where the Chaplain's office is located.

In the meantime Officer Rahilly was headed to the Catholic Chaplain's office to meet an inmate with whom he was going to make telephone calls. As he approached the door to the Chaplain's complex, Smith was exiting, carrying a homemade jewelry box. Smith asked Rahilly and then another officer if they wanted to buy the jewelry box. He then returned to the alcove. A short time later the defendant and Donna entered the Catholic Chaplain's office complex. Both the defendant and Donna walked to the rear room (the library) of the Chaplain's office complex. Donna Payant had only moments left to live.

Sometime after 1:00 p.m. an inmate approached the door to the Catholic Chaplain's office complex. He heard loud music or television noise coming from the office. He knocked on the door and Lemuel Smith "he came out too strong on me" and chased him away.

Sometime between 1:50 and 2:05 p.m. Officer Rahilly returned and opened the door to the Chaplain's complex. A piece of blue cardboard fell out of the door. The front office was a mess—fallen chairs piled and strewn about. He walked to the rear office (library); it was also dishevelled. There was a 55 gallon drum just inside the library door on the right with two boards across the top of it. On the desk there was an array of paper and books that were not piled neatly and another area was clear. There were books and papers on the floor as if they had been knocked over. The fish tank which is normally at the back wall was moved away from the back wall. The whole complex was "out of order". He returned to the front office to let an inmate make phone calls. The calls were made between 2:12 and 2:45 p.m.

While they were in the Chaplain's office Smith returned carrying a plastic item of some sort under his arm. Smith approached the door yelling "what are you doing in here" however he quieted down when he saw Officer Rahilly. He offered the Officer coffee, then went to the back of the complex. After trying some phone calls the officer walked to the rear room and saw Smith putting a shelf back in the closet. Rahilly asked him the reason for the shabby condition of the office and Smith indicated that he was painting the office. The Officer smelled paint but saw no freshly painted walls. The Officer then returned to the front office to attempt to make another phone call. Smith came to the entrance of the office door and asked Rahilly if he would be there for awhile and would he watch the office, because Smith was going to take the garbage out. Thereafter the Officer saw Smith walk past the Chaplain's front office carrying a 55 gallon drum and, after he passed, heard the drum hit the floor with a thud. He heard the door open and close and continued to try to make phone calls. Smith left and returned again in about ten minutes. (No one let him back in. Apparently he had propped the door latch again.) The Officer again left the front office and went to the library where Smith was. He was again rearranging the closet. The Officer started to have a conversation with Smith but the inmate yelled to him that he had been cut off on the phone and the Officer came back to the front office and indicated that they could make no more phone calls. The two left.

Officer LaBoy encountered Lemuel Smith at about 2:00 p.m. on May 15th at a gate on gate corridor. Smith, pushing a cart with two or three 55 gallon drums, was travelling in an easterly direction. Once Smith passed through that gate there were no more gates for him to pass through until he reached the dumpster site on the outside of the building. The cans on the cart he was pushing were full to within nine inches of the top. He was

perspiring. What was unusual was that the garbage cans were not overflowing, as they usually were.

At approximately 5:45 p.m. Sergeant Greene discovered that Donna had failed to report to her assignment. The area of her earlier assignment was searched twice without results. The inmates were locked in their cells at approximately 8:00 p.m. A state police bloodhound was brought into the institution and three separate trails were run. The dog was never taken to the area of the Catholic Chaplain's office.

At approximately 1:25 a.m., May 16, Peter Cooper, the civilian who drove the garbage truck was called back to the facility. Prior to his arrival, Sgt. Finnigan had agreed with the watch commander that all the garbage would be dumped on the ground, but apparently the civilian garbage truck driver had a conversation with the deputy superintendent in which it was agreed that the same procedure would be used as was used when prisoners escape, that is, dumping the dumpsters slowly into the garbage truck with correction officers standing by the side watching what fell in.

The truck had been emptied on the afternoon of the 15th and was empty when it was returned to Greenhaven. Cooper proceeded to dump the dumpsters into the truck while two correction officers stood on top of the truck with hand held flashlights and Sgt. Finnigan stood on the ground watching, and to compact the garbage when it was in the truck. This of course was a terrible mistake. A totally different process is effective when one is looking for a live human being.

When the dumpsters had been dumped into the garbage truck the truck was secured for the evening.

The next morning, the bulldozer operator at the Amenia Dump spread the garbage out as it was dumped from the truck and Donna Payant's body was found.

Peter Cooper indicated that from the position of the body when it finally came out of the truck, it would have been in one of the first three dumpsters emptied, that is the dumpster at building 13 or one of the first two dumpsters at gate corridor. It was the gate corridor dumpsters to which Officer LaBoy saw the defendant headed.

Donna Payant's body was examined in two separate autopsies.

When delivered to the medical examiner, the body was partially covered in the four large plastic bags in which it was wrapped when found at the Amenia Dump. Donna was dressed in a correction officer uniform and the clothing was in marked disarray; the blouse was open, the brassiere was pushed up exposing both breasts; there was a big tear in the back seam and crotch of the pants; the panties were in place. The arms were tied with a single cord under the right arm in front of the shoulder, in back of the neck, down the shoulder under the left arm, across the back to the right wrist.[3] There was also a piece of cord loosely wrapped around the neck in two loops.

Donna Payant died from strangulation but there were numerous other injuries.[4] There was a large area of contusion involving the front temple area, another involving the bridge of the nose extended to the inner portion of the left upper eye lid, and others on the face. There was dried blood in the nostrils, the septum was broken. The frenulum (a ridge or fold that attaches the upper lip to the

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[3] It would appear that the ligatures around the wrist were placed after death.

[4] The pathologists had no difficulty distinguishing between injuries that were pre-mortem, and post-mortem injuries. The post-mortem injuries were consistent with being compacted in a garbage truck and run over with a bulldozer. The injuries discussed herein are the pre-mortem injuries only (including "peri-mortem", *i.e.*, at about the time of death).

gum) was broken and there was hemorrhaging in the surrounding tissues. There were ligature marks on the neck. Injuries to the back indicated that the back was traumatized either against a wall, a floor or by a blunt object prior to death. There was extensive hemorrhage in the skin on top of the skull bones, but the skull itself was not fractured. The injuries to the head were capable of causing unconsciousness. There was extensive hemmorrhage in the muscles about the rectum indicating the insertion of a blunt object. There was at least one bite mark, possibly two, on the breast and the amputation of both nipples appeared to have been done by biting.

The evidence indicated that the victim had been punched or struck in the head, probably smashed against the wall or floor, bitten on the breast, strangled, and a blunt instrument inserted in her rectum.[5]

Four forensic odontologists unequivocally identified the bite mark on Donna Payant's breast as having been caused by Lemuel Smith's teeth. They also identified that bite mark as having been made by the same person as made a prior known bite mark of Lemuel Smith, that found on the corpse of Marilee Wilson.[6]

On April 21, 1983, a jury returned a verdict convicting the defendant of murder in the first degree. On June 10, 1983, the defendant Lemuel Smith was sentenced to death.

The Issue Raised

By motion dated November 25, 1981 the defendant moved to dismiss the indictment alleging, inter alia,

> "The Statute under which the defendant has been indicted is unconstitutional on its face and the in-

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[5] The pre-mortem injuries involved only a slight loss of blood.

[6] The jury was not advised of the source of the prior known bite mark.

> dictment against the defendant must, therefore, be dismissed" "The Supreme Court has mandated that any death penalty statute to be constitutional must provide for the consideration of relevant mitigating circumstances relating to the particular offender and the particular offense"

The People opposed and the trial court, by order dated December 11, 1981, denied the "motion to dismiss the indictment on constitutional grounds".

ARGUMENT

The New York death penalty statute is constitutional and constitutional as applied to defendant.

> ". . . the death penalty undoubtedly is a significant deterrent . . . And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate".
>
> *Gregg* v. *Georgia,* 428 US 153, 49 LEd 2d 859, 96 SCt 2909 (1976), reh den 429 US 875, 50 LEd 2d 158, 97 SCt 197

In the case of Lemuel Smith, a life prisoner, the fact that no sanction other than death is adequate has been proven beyond any possible doubt. The defendant at the time of the commission of the instant crime was serving five sentences of 25 years to life. Additionally, two other murder charges arising out of crimes occurring at different times and places had been dismissed because it was impossible to impose further punishment on the defendant.

A. THE STATUTE

The statute under which the defendant was charged and convicted is potentially applicable only against the most egregious offenders, those who have intentionally mur-

dered another, who have intentionally attempted to murder a police or corrections officer, who have committed arson by incendiary device of an occupied building, who have kidnapped for ransom or certain other insidious reason, who have possessed or sold (or attempted to do so) large quantities of narcotic drugs (real or synthetic), who have been convicted of three or more violent felony offenses or who have been convicted of three or more felony offenses and whose history and character and the nature and circumstances of whose criminal conduct has warranted imposition of a life sentence.

The statute, even then, does not apply to all homicides but only to intentional murders where the intent of the perpetrator is to cause the death of the person killed. The defendant must be more than 18 years old at the time of the commission of the crime and must not have been acting under the influence of extreme emotional disturbance.

The potential application of the statute is limited to an extremely limited group of proven perennial criminals against whom no other adequate sanction may be imposed. Lemuel Smith is a perfect example; two independent murder charges against him were dismissed solely because no adequate sanction could be imposed. (See: *Gregg* v. *Georgia, supra.*)

The New York statute duly enacted by the elected representatives of the People is presumed to be valid absent clear evident to the contrary (*Gregg* v. *Georgia, supra; People* v. *Davis,* 43 NY 2d 17, 400 NYS2d 735, 371 NE2d 456 (1977), cert den 435 US 998, 438 US 914).

B. MANDATORY OR DISCRETIONARY?

Does New York have a mandatory statute? ". . . The New York statute is not truly a 'mandatory' capital punishment statute, as that term has been used by the Supreme

Court" (at 43). "True, other capital punishment statutes have provided for consideration of mitigating factors after the jury has convicted defendant of the substantive offense. But there is no reason to assume that mitigating factors could not, instead, and even preferably, be built into the definition of the substantive offense . . . Certainly, if every possible mitigating factor were made a defense to the substantive crime, there would be little reason for the jury to consider mitigating factors in making a discretionary sentencing determination" (at 44, cit. om.). "But, in any event, the New York statute although written in mandatory terms, is not embracively mandatory in that it does not encompass, indiscriminately and without consideration of mitigating factors, a mass aggregation of crimes. Thus, since Section 125.27 of the Penal Law does require the jury to consider mitigating factors as elements of the substantive crime of first degree murder, there is no constitutional violation." (at 45) (*People* v. *Davis, supra,* dissenting opinion per Breitel CJ).

C. CONSIDERATION OF THE STATUTE AS MANDATORY

This Court has held that a "mandatory death penalty for a *broad category* of homicidal offenses constitutes cruel and unusual punishment within the meaning of the Eighth and Fourteenth Amendments" but has refused to prohibit all mandatory death sentences, stating that "a mandatory death penalty limited to an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence, defined in large part in terms of the character or record of the offender" is not included in the general prohibition. (*Woodson* v. *North Carolina,* 428 US 280, 304, 49 LEd2d 944, 96 SCt 2978 (1976) n. 7 [emphasis supplied]). That category, "defined in large part in terms of the character or record of the offender", takes

into consideration "aggravating" and "mitigating" circumstances as related to each other by definition in a manner similar to that required under a discretionary statute. The permissible statute thus suffers neither the harshness nor arbitrariness of the statutes condemned in *Furman* v. *Georgia,* 408 US 238, 33 LEd2d 346, 92 SCt 2726 (1972), reh den 409 US 902, 34 LEd2d 164, 93 SCt 89, and the early days of our country.

A mandatory death penalty statute such as that under consideration contains within the definition of the criminal offense consideration of appropriate aggravating and mitigating circumstances. ". . . intentional killing by a person serving a life sentence or by a person previously convicted of an unrelated murder defines the capital crime at least in significant part in terms of the character or record of the individual offender. Although even this narrow category does not permit the jury to consider possible mitigating factors, a prisoner serving a life sentence presents a unique problem that may justify such a law." (*S. Roberts* v. *Louisiana,* 428 US 325, 49 LEd2d 974, 96 SCt 3001 (1976), reh den 429 US 890 50 LEd2d 173, 97 SCt 248; *H. Roberts* v. *Louisiana,* 431 US 633, 52 LEd2d 637, 97 SCt 1993 [1977]).

While in most cases prior to imposing the death penalty the sentencing authority must consider any relevant mitigating factor, such need not be considered in what may be categorized as "the rarest kind of capital case" (*Lockett* v. *Ohio,* 438 US 586, 57 LEd2d 973, 98 SCt 2954 (1978). As to what is the "rarest kind of capital case" the Court refers to "a mandatory death sentence as, for example, when a prisoner—or escapee—under a life sentence is found guilty of murder". (Lockett v. Ohio, supra, n. 11).

The New York statute applies only to "the rarest kind of capital case" and this Court has never intimated that a "lifer" who commits an intentional murder must be

subjected to any penalty other than death. (*H. Roberts* v. *Louisiana, supra,* 635, n. 2; *S. Roberts* v. *Louisiana, supra,* 334 n. 9; *Woodson* v. *North Carolina, supra,* nn. 7, 25; *Gregg* v. *Georgia, supra; Lockett* v. *Ohio, supra,* 604 n. 11). And, using the test applied to discretionary sentences, under all circumstances proof of the crime proves aggravating circumstances which outweigh any possible mitigating circumstances and which mandate the penalty of death (See: *Proffitt* v. *Florida,* 428 US 242, 49 LE2d 913, 96 SCt 2980, (1976) reh den 429 US 875, 50 LEd2d 158, 97 SCt 197).

The New York statute is "limited to an extremely narrow category of homicide . . . defined in large part in terms of the character or record of the offender." (*Woodson* v. *North Carolina,* supra, 287, n. 7)[7] and applies only to that "rarest kind of capital case" where no possibly mitigating circumstances must be considered (Compare: *Lockett* v. *Ohio, supra,* n. 11). For all that is constitutionally required is that, acting with an even hand, the State be it the legislature or courts find that aggravating circumstances outweigh mitigating. The New York Legislature, as permitted by the Constitution, has determined that the aggravating circumstance of the intentional murder of another by a person over the age of eighteen who is serving a sentence of at least 15 years to life and did not act under the influence of extreme emotional disturbance[8] outweighs any possible mitigating factor. That determination does not offend the decisions of this Court, *Woodson* v. *North Carolina, supra; Gregg* v. *Georgia, supra; H. Roberts* v. *Louisiana, supra; S. Roberts* v. *Louisi-*

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[7] See Also: *Marshall* v. *Lonberger,* —— US ——, 74 LEd2d 646, 103 SCt 843 (1983).

[8] The issues were taken out of the case when defense counsel stated he wanted no lesser charge (5980).

ana, supra; Lockett v. *Ohio, supra.*[9] The New York statute is constitutionally permissible.

D. CONSIDERATION OF THE STATUTE AS DISCRETIONARY

In capital cases "where discretion is afforded . . . that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action" (*Gregg* v. *Georgia, supra,* 189), and that direction and limitation "requires consideration of the character and record of the individual offender and the circumstances of the particular offense" (*Woodson* v. *North Carolina, supra*).

However the Constitution requires consideration of only relevant mitigating factors (*Lockett* v. *Ohio, supra*) and only consideration thereof, not that they be given any particular weight (*Eddings* v. *Oklahoma,* 455 US 104, 71 LEd2d 1, 102 SCt 869 [1982]). In any event, the court retains its traditional authority "to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offenses" (*Lockett* v. *Ohio, supra,* 604 n. 12).

If a discretionary statute is to pass constitutional muster, the relevant factors to be considered must be set forth or in some way limited so that the arbitrariness of *Furman* v. *Georgia, supra* is not present. Florida uses a "laundry list" of mitigating factors, Texas three questions, and New York the definition of the crime. On aggravating factors, Florida a laundry list, Texas knowing and intentional murder in five circumstances and New York know-

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[9] The court of the State of Nevada (*Shuman* v. *State,* 578 P2d 1183 (Nev 1978) cov vac on hc (*Shuman* v. *Wolff,* 571 FS 213 (DC Nev 1983), on appeal and Alabama (*Thigpen* v. *State,* 355 So 2d 392, *aff'd* 355 So 2d 400 (Ala 1977)) have reached similar conclusions on similar issues.

ing and intentional murder in one circumstance.[10] Each statute is constitutionally permissible and each mandates consideration of basically the same factors.

Age[11] is a factor which is often considered on the issue of mitigation. In Florida, a child of any age who commits a crime punishable by life imprisonment or death may be charged and punished as an adult [F.S.A. 39.02(5) (c)].

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[10] See: *People* v. *Davis, supra.*

[11] *Georgia*: The age of criminal responsibility is thirteen (Ga. Code Ann 26-701). Age can be considered by the jury when it considers "appropriate" mitigating circumstances (Ga. Code Ann. § 27.2534.1(b); *Moore* v. *State,* 233 Ga 861, 213 SE2d 829 [Ga 1975]).

Oklahoma: The age of criminal responsibility is seven and a defendant can be certified for trial as an adult if the charge is a felony (10 Okl. St. Ann. $ 1112). The statute stricken by the Court (*Green* v. *Oklahoma,* 428 US 907, 49 LEd2d 1214, 96 SCt 3216 [1976]) mandated the death penalty upon conviction without any consideration of mitigating factors including the age of the defendant (21 Okl. St. Ann. § 701.3).

See also: *Eddings* v. *Oklahoma, supra.* " . . . When the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant".

North Carolina: A defendant who has reached his fourteenth birthday and is charged with a felony may be tried in an adult court but if he is charged with capital crime must be so tried (N.C. Gen. Stat., 7A-280). Upon conviction of murder in the First Degree, the statute stricken by the Court (*Woodson* v. *North Carolina, supra*) mandated the death penalty without any consideration of age in mitigation (N.C. Gen. Stat., 14-17).

Louisiana: The age of criminal responsibility is seventeen, but in the case of a capital crime, fifteen (LSA-R.S. 13:1570 [5]). The statute held unconstitutional (*S. Roberts* v. *Louisiana; H. Roberts* v. *Louisiana, supra,* in addition to reducing the age of criminal responsibility mandated the death penalty upon the conviction of Murder in the First Degree (LSA-R.S. 14:30).

Ohio: The statute stricken in *Lockett* v. *Ohio, supra,* applied to any person fifteen years or older (Ohio Rev. Code Ann. § 1251.26).

Age is considered as a mitigating factor, but only where the defendant is under eighteen (See: *Songer* v. *State*, 322 So 2d 481 (SC Fla 1975) vac oth gr 430 US 952). In Texas the age of adult criminal responsibility is fifteen but no person may be punished by death for an offense committed while he was younger than seventeen (V.T.C.A. Penal Code §8.07).

New York like Florida, Texas and Georgia considers age a mitigating factor and like Texas considers it such by definition. Thirteen is the age of criminal responsibility for murder in New York (Penal Law § 30.00), but no person can be convicted of Murder in the First Degree unless he "was more than eighteen years old at the time of the commission of the crime". (Penal Law § 125.27(1)(b)). In New York youth is a mitigating factor to a greater extent then in Texas or Florida and unlike in Georgia and Florida, it must be found beyond a reasonable doubt not to be present before the death penalty can be imposed.

The mental state of the defendant is another factor that is often considered in mitigation. The Florida statute lists as a mitigating, but not controlling, circumstance the fact that the crime "was committed while the defendant was under the influence of extreme mental or emotional disturbance." The Texas statute permits consideration of the issue of emotional disturbance only as part of three questions to be answered by the jury. In New York, extreme emotional disturbance is an absolute defense to the crime of murder in the first degree.

Almost every defense or mitigating circumstance which would be potentially available can be considered under the general category of extreme emotional disturbance, if not effective in its own right to be a defense to all criminal activity. As stated by the Court of Appeals,

> "This defense (extreme emotional disturbance) allows a defendant charged with the commission of acts

> which would otherwise constitute murder to demonstrate the existence of mitigating factors which indicate that, although he is not free from responsibility for his crime, he ought to be punished less severely by reducing the crime upon conviction to manslaughter in the first degree".
>
> (*People* v. *Casassa,* 49 NY 2d 668, 427 NYS 2d 769, 404 NE2d 1310 (1980), cert den 449 US 842

There is no magical formula to determine what constitutes extreme emotional disturbance and the jury is free to extend mercy upon what it believes to be appropriate facts.

> "In the end, we believe that what the Legislature intended in enacting the statute was to allow the finder of fact the discretionary power to mitigate the penalty when presented with a situation which, under the circumstances, appears to them to have caused an understandable weakness in one of their fellows. Perhaps the chief virtue of the statute is that it allows such discretion without engaging in a detailed explanation of individual circumstances in which the statute would apply, thus avoiding the 'mystifying cloud of words' which Mr. Justice Cardozo abhorred."
>
> (*People* v. *Casassa, supra,* 680)

"Absence of any prior conviction" is a relevant factor which may be considered in mitigation (*H. Roberts* v. *Louisiana,* supra). Florida sets forth as a mitigating factor the fact that "the defendant has no significant history of prior criminal activity" (F.S.A. 921.141) but the finding of that mitigating factor does not mean that the death penalty cannot be imposed if the aggravating circumstances outweigh the mitigating circumstances. In Georgia, a defendant's prior record is considered under the general category of other appropriate aggravating or mitigating circumstances and in Texas the prior record is

considered in determining "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" (V.T.C.A., Code Crim. Proc. § 37.071(b)). The other statutes considered and found by the Court to violate constitutional mandates allow no consideration of a defendant's prior record.[12] The New York statute applies only to defendants who have a serious prior felony record and have been sentenced to at least 15 years to life, and the jury must find that fact beyond a reasonable doubt. Lack of a prior criminal record is not only a mitigating factor, it is an absolute defense to a charge of murder in the first degree.

The intent of the defendant is another factor often considered on the issue of mitigation. In order to sustain the imposition of the death penalty it is only necessary that the defendant kill, attempt to kill, intend that a killing take place or that lethal force be employed. (*Enmund* v. *Florida,* 458 US 782, 73 LEd2d 1140, 102 SCt 3368 [1982]). So long as the defendant is the killer, capital punishment is permitted in an appropriate case whether or not he had the intent to kill. Under the Florida,[13] Texas and Georgia

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[12] N.C. Gen. Stat 14-17; LSA-R.S. 14:30; 21 Okl. St. Ann. § 701.3; Ohio Rev. Code § 2929.03.

[13] The Florida statute broadly defines the crimes which subject a defendant to the death penalty and includes certain "felony murders". (F.S.A. 782.04). Thus one of the mitigating circumstances is that "the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor." Yet, one who did not commit or attempt the killing or intend that the killing be committed could be sentenced to death if aggravating factors outweigh that mitigating factor.

The Ohio statute would not allow consideration of the defendant's lack of intent or minor role on the issue of mitigation.

For an analysis of other jurisdictions, see: *Enmund* v. *Florida, supra.*

statutes approved by the Court, it is not necessary, in order to sustain a capital sentence, to prove that the defendant intentionally committed the murder. Lack of intent is an absolute defense to the charge of Murder in the the First Degree under the New York law.

The factors most commonly considered on the issue of mitigation in the states where the statutes have been upheld are absolute defenses to the charge in New York. Thus, in those states, even if they are all present and the aggravating circumstances outweigh, the death penalty may be imposed, but, in New York, even if one is present, the defendant cannot be convicted of a capital offense.

E. OTHER POSSIBLE SANCTIONS

It is not necessary to consider whether any less severe sanction would be appropriate

> ". . . in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people."
>
> *Gregg* v. *Georgia, supra,* 174

but even if considered, the conclusion is inescapable that under the circumstances outlined in the New York statute, no other sanction is effective.

It is argued in general against capital punishment that "capital punishment does not deter". Compare, e.g., *People* v. *Davis, supra,* (Breitel, CJ, dissenting). In fact, that statement is never meant literally. Of course the death penalty deters[14] and it is absurd to suggest that at

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[14] See comments of John Wojtowicz while he was holding hostages (209a).

least some people in the population would not be deterred from committing an offense (whether it be homicide or reckless driving or illegal parking) were the sanction of the death penalty the mandatory sentence therefor. What the argument really means to say is: "The death penalty does not deter in a demonstrably more effective way than the sentence of life imprisonment".

However true that may be with respect to the imposition of the death penalty in ordinary cases, the one case in which *a priori* that proposition is untrue is the case of the person who is already serving a sentence which may confine him for the remainder of his life.

For most of us, to be sentenced to state prison for life would be as total a destruction of life as we know it as being put to death, and there is very great merit in the argument that in most cases the death penalty probably does not deter in a more significant or more effective way than life imprisonment. However, for the lifer in our state prisons, the opposite is true.

What the Court in essence said in *Woodson* is that even for the crime of murder it is appropriate for discretion to be applicable to the death penalty and the sentencing authority should always (except in the "exceptional" situation) be able to choose between the death penalty and another significiant substantial punishment. However, in the case of a lifer, no other punishment is significant or substantial,[15] and if the rule of *Woodson* were applied to killings by lifers, the rule of law it represents would be distorted to say that the sentencing authority must have discretion to impose the sentence of death or no punishment at all.

It has been suggested, that to apply the death penalty to a person sentenced to a term of 15 years to life who

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[15] See e.g., *Furman* v. *Georgia, supra,* Stewart concurring, 307-08.

has only a very short time remaining to that sentence before parole is not defensible. Consider however the hypothetical situation of an inmate who has one week remaining to serve on an indeterminate life sentence who attacks, maims and sexually assaults a female correction officer in the institution. At that point it is reasonably certain not only that he faces extensive imprisonment upon an indictment for those offenses, but that in any event he is subject to being detained for the remainder of his life without release on parole as a result of this conduct. What deterrent, at that point, would exist to dissuade him from killing the female correction officer thereby eliminating the witness against him and increasing the possibility of avoidance of any punishment unless the punishment he knew would be imposed for the killing (were he found guilty of it) was one substantially more serious than being confined for the remainder of his life as an exercise of discretion by the parole authorities? It is perfectly obvious that the only such sentence is death.

Life imprisonment in solitary confinement is not, even if constitutionally permissible, a viable alternative. For example, at the time Johnny Harris murdered a guard during a riot, he was serving five life sentences and was in punitive segregation at a maximum security prison (*Harris* v. *State,* 352 So 2d 479, 484-85 [Ala 1979]).

F. THE RIGHTS OF OTHER PRISONERS

The Eighth Amendment to the Constitution creates an obligation on the State to "(furnish) sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety" (*Wolfish v. Levi,* 573 F2d 118, 125 (2 Cir 1978) rev 441 US 520). Those rights are secured to inmates under Correction Law Section 137 (see also 18 USC 4042). It is the duty of the State to ensure the safety of its inmates and, of course, is employees, by enforcing the penal law against the other prisoners.

Effective enforcement of penal provisions mandates the availability of effective sanctions. The Legislature has recognized that fact, not only in setting forth the penalties for proscribed conduct but also in the statement of the general purposes of the law. Among the purposes of the penal law are, "to give fair warning of the nature of the conduct proscribed and of the sentences authorized upon conviction" and to insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized . . ." (PL § 125.27).

If the State does not impose necessary penal sanctions against persons who commit crimes in prisons, the State violates the constitutional rights of the other prisoners in the prison system. In the case of a "lifer" who commits murder the necessary penal sanction is death.

G. CONSTITUTIONAL AS APPLIED TO LEMUEL SMITH

Death is an appropriate penalty in any instance in which a life is taken provided aggravating factors outweigh *relevant* mitigating factors. Applying the most stringent of tests (even though it does not apply in the instant case), Lemuel Smith merits the death penalty.

1. THE MURDER OF DONNA PAYANT

At the time of the instant crime, the defendant was incarcerated under five 25 year to life sentences. His victim, Donna Payant, was a correction officer.[16] On May 15,

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[16] In enacting a death penalty statute, the New York Legislature made it applicable in only three instances: 1) the victim was a police officer; 2) the victim was a correction officer; 3) the defendant was serving 15 to life or more. While the first two provisions were stricken by the Court of Appeals (*People* v. *Davis*, *supra*), the legislative considerations and intent are important. The defendant, a "lifer" murdered Donna Payant, a correction officer thus coming under two categories out of three which the Legislature determined warranted the death penalty.

1981, the defendant lured the victim into the Chaplain's complex and there viciously and sadistically, beat, strangled, bit and assaulted her causing her death. After tying her body, he placed it in plastic bags and threw it into trash dumpsters.

2. THE DEFENDANT'S PRIOR CRIMINAL HISTORY

a) DOROTHY WATERSTREET

On January 21, 1958, Dorothy Waterstreet was robbed and kicked and stomped repeatedly in the head. The victim was a neighbor of the defendant who died on the street near her home. The defendant was 17 years old at the time of the murder and though a suspect was never charged; he later admitted the crime.

b) EDNA JOHNSON (Robbery with a deadly weapon, Assault to murder)

On July 30, 1958 the defendant accosted his victim at her place of employment in Baltimore, Maryland, tied her hands and feet and beat her about the face with a metal pipe. The victim suffered a double compound fracture of the head which required six and one-half hours of surgery and injuries to her face and nose which required plastic surgery. The victim's life was saved when a customer entered the store and defendant fled. The defendant was sentenced to 10-20 years and was paroled November 25, 1968.

c) CAROL FERRUCCI (Kidnapping, robbery, attempted rape, assault)

On May 19, 1969, the defendant armed with a knife, abducted the 23 year old woman at her car at about noon. He forced her to drive to a park, put her in the back seat, tied her hands and feet, put kleenix and a handkerchief in her mouth, slapped her face, took currency and rings, tore her clothes and attempted to rape her. She was spared when a car horn blew and the defendant got

into the front seat and attempted to drive away. Instead, he backed the car into a tree and the victim managed to open the back door and escape. The defendant fled.

d) ANN PAIGE (Kidnapping, rape, sodomy)

On May 19, 1969, at about 2:10 p.m., the defendant went to the home of Mrs. Paige, a friend of the family, grabbed her around the neck and displayed a knife. He tied her hands behind her with rawhide, forced her to her car, tied her feet with rawhide, then drove her to his parents' house in Saratoga, New York. Upon arriving, the defendant raped her, tied her to a bed with a towel around her mouth to keep her quiet, then left. Upon his return, he untied her then tied her again using tape. He then put lit cigarettes out on her breast and neck, punched her twice in the face and forced her to perform acts of both oral and anal sodomy. The victim obtained her release by promising not to tell what had happened. She drove back to Schenectady and the defendant got out of the car at about 8:00 p.m. The defendant was sentenced to two concurrent 4-15 year sentences consecutive to the Maryland sentences (plea covered Ferucci and Paige charges). The defendant was paroled October 5, 1976.

e) MARGARET BYRON AND ROBERT HEDDERMAN (Murder, Robbery)

On November 24, 1976, the defendant accosted the victims in the religious book store they operated. The victims were robbed, tied, tortured and repeatedly stabbed. The throats of both were slit. The defendant was sentenced to 25 years to life two terms concurrent and two to be served consecutively and 12½ to 25 years to be served concurrently.[17]

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[17] Judgment affirmed, *People* v. *Smith*, 59 NY 2d 156, 464 NYS 2d 399, 451 NE 2d 157 (1983); see also *People* v. *Smith*, 77 AD2d 712, 430 NYS 2d 713 (1980) lv den 51 NY2d 776.

f) JOAN RICHBURG (Murder, rape)

On December 23, 1976, the 24 year old victim was abducted at her car, tied, her scarf stuffed in her throat (which caused her death by asphyxiation), beaten about the face and raped. There were ligature marks on her neck, her throat was slit from ear to ear and her body was sexually mutilated. The charges were dismissed because no effective punishment was available.

g) MARILEE WILSON (Murder)

On July 21, 1977, the defendant abducted the victim, tied, strangled (she died of ligature strangulation), beat (face) and crushed (chest) her. Teeth marks and cigarette burns were found on the victim's nose. Sticks were rammed into the various orifices causing massive internal damage and the body was sexually mutilated. The charges were dismissed because no further punishment was possible.

h) MARYANN MAGGIO (Kidnapping, robbery, rape, sodomy)

On August 19, 1977, the defendant armed with a starter's pistol abducted the 18 year old victim from her place of employment and robbed her. He then forced the victim to drive him to his parents' house in Saratoga. There he tied the victim, punched her in the stomach, slapped her face, forced her to commit oral sodomy, raped her, committed anal sodomy upon her and raped her again. He then forced her to drive back toward Schenectady and on the way the vehicle was stopped by the police.

The defendant was sentenced to concurrent 25 years to life sentences as a persistent felony offender to be served consecutive to any other sentences (Schenectady Co.).[18] He was sentenced to 10-20 years (Saratoga Co.).[19]

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[18] Affirmed *People* v. *Smith, supra.*

[19] Affirmed *People* v. *Smith,* 81 AD 2d 1046 (3 Dept 1981).

3. CULPABILITY OF DEFENDANT

The defendant was the actual prepetrator[20] of the instant intentional murder as well as six previous intenticnal murders.

4. AGE OF THE DEFENDANT

The defendant was 39 years of age at the time of the instant crime. He committed his first murder at the age of 17 and between the two, committed five additional murders.

5. MENTAL CONDITION OF THE DEFENDANT

The defendant did not present any defense or any evidence of insanity or extreme emotional disturbance (see *People* v. *Casassa,* supra). In fact, counsel specifically stated that he did not want a downcharge to manslaughter (5979-80).[21]

On two prior occasions (Maggio and Byron/Hedderman) the defendant raised the defense of insanity and in each instance the defendant was convicted and the conviction affirmed. Prosecution witnesses testified that the defendant had an antisocial personality.

6. ALCOHOL AND DRUG INVOLVEMENT

There is no evidence of the presence of alcohol or drugs in this or any of the other criminal activity of the defendant.

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[20] No view of the evidence would support only a lesser offense and the defendant, through counsel, stated that he wanted no such charge (Compare: *Beck* v. *Alabama,* 447 US 625, 65 LEd 2d 392, 100 SCt 2382 [1980]).

[21] Which would be appropriate in the case of extreme emotional disturbance.

7. PROGNOSIS

Both times the defendant was released after extended periods of incarceration he committed violent crimes. Now, with no prospect for release, he has commtted murder in prison.

The defendant was paroled November 25, 1968 and on May 19, 1969 kidnapped and sexually assaulted two women in separate incidents. He was paroled on October 5, 1976, and by December 23, 1976 had brutally murdered three people. Within a year of his release he had brutally murdered four people and kidnapped and sexually assaulted another. The defendant's first life sentence was affirmed by the Appellate Division in July 1980 and leave to appeal to the Court of Appeals denied September 15, 1980. With no prospect of release, exactly eight months later, May 15, 1981, he murdered Donna Payant.

8. CONCLUSION

There are no possible relevant mitigating circumstances which could outweigh the aggravating circumstances. Lemuel Smith was properly sentenced to death.

Conclusion

The New York statute mandating the imposition of the death penalty upon a defendant then serving a sentence of at least fifteen years to life who is convicted of the intentional unmitigated murder of another is constitutional.

The instant petition for a writ of certiorari to the New York Court of Appeals should be granted.

Respectfully submitted,

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STATE OF NEW YORK
COURT OF APPEALS
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SupC No. 235
THE PEOPLE &C.,

Respondent

v.

LEMUEL SMITH,

Appellant.

OPINION

This Opinion is uncorrected and subject to revision before publication in the New York Reports.

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(235) William M. Kunstler , Mark B. Gombiner, & C., Vernon Mason, NYC, for appellant.

William E. Stanton, Special District Attorney, Dutchess County (B. Anthony Morosco & Richard Schisler of counsel) for respondent.

Robert Abrams, Attorney (Michael S. Buskus, Peter H. Schiff, & Peter J. Dooley of counsel) pro se.

Jonathan E. Gradess, Albany, for NYS Defenders Assn. & Mitchell E. Karlan & John H. Hall, NYC, for NAACP Legal Fund et al., amicus curiae.

KAYE, J.

After a jury trial, defendant was convicted of murder in the first degree and sentenced to death. This direct

appeal as of right by defendant (Const., Art VI, §3, subd 6; CPL 450.70, subd 1), the lone resident of New York's death row, presents three questions: (1) whether the evidence was sufficient to prove his guilt beyond a reasonable doubt; (2) whether alleged trial errors deprived him of a fair trial; and (3) whether state's mandatory death sentence (Penal Law, §60.06) for one convicted of murder while "confined in a state correctional institution . . . upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life" (Penal Law §125.27, subd 1, par (a), subpar (iii)) is constitutional. We conclude that the evidence was sufficient to prove defendant's guilt beyond a reasonable doubt and that the court below committed no reversible error in

the conduct of the proceedings. We also conclude, however, that New York's mandatory death penalty law is unconstitutional. For these reasons we modify the judgment by vacating the sentence of death, reducing the conviction to murder in the second degree, and remitting the case to the Supreme Court, Dutchess County for resentencing and, as so modified, we affirm the judgment.

In May 1981, Donna Payant was employed as a corrections officer at the Green Haven Correctional Facility in Stormville, New York, where defendant was serving an indeterminate sentence of 25 years to life.[1] Some time after

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[1]Defendant was actually given three consecutive sentences of 25 years to life, but they were imposed under §70.30 of the Penal Law as it existed before the 1978 amendment (L 1978, c. 481, § 24),

reporting for work on the afternoon of May 15, 1981, Payant disappeared. Her body was discovered the next morning at a landfill in Amenia, New York, when refuse from Green Haven was dumped and examined. An autopsy revealed that she had died of ligature strangulation.

Three weeks later, an information was filed in Beekman Town Court accusing defendant of Payant's murder and charging him with violation of section 235.27 of the Penal Law, a felony which mandates a sentence of death upon conviction. The Dutchess County Grand Jury indicted defendant in October 1981. Because of a potential conflict involving the Dutchess County District Attorney's office, a Special District Attorney was

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and therefore merged into a single 25-year-to-life term.

appointed by the court, and at a later date defendant's present counsel was appointed pursuant to County Law article 18-B. Defendant's pretrial motions to dismiss the indictment, for refusal of the trial judge, and for a change of venue were denied.

Defendant's trial commenced in January 1983. On April 21, 1983, after three days' deliberation, the jury returned a verdict of guilty. Defendant's motion to set aside that verdict was denied, and on June 10, 1983 he was sentenced to death. This appeal followed.

The People's case consisted of circumstantial evidence showing that Payant's known movements at Green Haven on May 15, 1981 brought her to an area near the Catholic Chaplain's office, where defendant worked that day, that

Payant and defendant had previously spoken, that Payant and defendant were observed entering the Catholic Chaplain's office together on the day of her disappearance, and that defendant had access to a room (the library of the Chaplain's office) to which he could have lured Payant and killed her in relative seclusion, to materials (cord, plastic bags and masking tape) similar to those with which she was killed and her body was wrapped, and to vehicles (a large waste drum, a cart for moving refuse, and trash dumpsters) for disposal of her body. The People also introduced testimony of an inculpatory admission defendant made to a fellow inmate approximately one year after Payant's death, and expert testimony that a pre-mortem wound on Payant's chest was a bite mark made by defendant.

Defendant at trial showed that several corrections officers had made prior statements that Payant had been seen at various points of the institution on May 15 after the alleged time of her murder, and that the investigation of Payant's death had produced no evidence -- save the bite mark -- connecting defendant to Payant's murder. The defense introduced its own expert testimony to show that the mark on Payant's body could not be attributed to defendant, and indeed that it was not even a bite mark.

As discussed in the ensuing sections, we conclude that defendant's guilt was established beyond a reasonable doubt, that there was no reversible error in the conduct of the trial, and that the mandatory death penalty statute is unconstitutional.

I

On this appeal from a judgment of death, the New York Constitution empowers us to review the facts (NY Const, art VI, §§ 3, 5). The scope of our inquiry has been defined in People v. Davis (43 NY2d 17, 36, cert denied 435 US 998) and People v. Crum (272 NY 348, 350):

> A review of the facts means that we shall examine the evidence to determine whether in our judgment it has been sufficient to make out a case of murder beyond a reasonable doubt. We are obliged to weigh the evidence and form a conclusion as to the facts. It is not sufficient, as in most of the cases with us, to find evidence which presents a question of fact; it is necessary to go further before we can affirm a conviction and find that the evidence is of such weight and credibility as to convince us that the jury was justified in finding the defendant guilty beyond a reasonable doubt.

Even in a capital case, however, "this court should not readily interfere with verdicts of jurors who have had the ad-

vantage of seeing and hearing witnesses." (People v Crum, 272 NY 348, 357, supra.)

The People's theory is that defendant killed Payant in the early afternoon of May 15, 1981 inside the Catholic Chaplain's office complex, wrapped her body in plastic bags, placed the body in a 55-gallon waste drum, and dumped it into a dumpster maintained for the disposal of trash, from which it was collected and later discovered. Upon our review of the record, we conclude that the evidence supported this theory and was sufficient to make out a case of murder beyond a reasonable doubt. The evidence which in our view justified the jury in finding defendant guilty may be summarized as follows.

Donna Payant began her career at Green Haven some two months before

her death. She had spoken with defendant on at least two occasions prior to the date of her disappearance: once when she told him she admired a religious article he had crafted and he in turn told her that he worked in the Chaplain's office, and a second time when they spoke in an area of Green Haven's hospital corridor, near the Chaplain's office, on May 12, 1981. (A diagram of Green Haven is annexed to this Opinion.)

On May 15, Payant was scheduled to work the 1:00 to 9:00 p.m. shift and reported to a line-up to receive her assignments. Her assignments that day were to patrol the A/B yard area, then to escort two companies of inmates from D block to the mess hall for dinner and back, lock those inmates in and conduct a count, and finally to report to the

mess hall area at 6:00 p.m. Payant, along with officers Claude King and Barbara Hinson, after line-up went into the officers' mess, where she purchased a soft drink, then proceeded back to the westside corridor and headed south toward their assignments. The telephone in the westside corridor rang and Officer Hinson answered it. The caller asked for Payant and Hinson called her to the telephone. Payant was on the telephone briefly and was overheard saying "what," "who," "yes," and "okay." After hanging up the telephone, Payant told King there was a problem she had to straighten out and that she would be right back, and she headed back down the westside corridor.

Payant passed both the westside control station in the hospital corridor, heading east, at about 1:00

p.m. That direction would lead to the Chaplain's office complex at the other side of the hospital corridor -- an area where defendant worked and had been seen that day.

Defendant was a clerk to the Catholic Chaplain. His duties included cleaning the Chaplain's office complex and emptying the garbage collected there. He also worked in Green Haven's package room where, once again, his duties included cleaning the area and transporting and dumping the garbage.

On May 15, 1981 the Catholic Chaplain was away from the institution on military leave. When defendant arrived for work there at 8:30 a.m. the officer in the hospital corridor, as he had done before, let him through the control gates and into the Chaplain's office. After returning to his cell for

a count, defendant came back to the Chaplain's office, which was opened for him again at 12:30 p.m. Defendant was observed by corrections officers in the hospital corridor area near the Chaplain's office at or about 1:00 p.m., and around that same time another inmate (Teddy Goodman) saw defendant and Payant enter the Chaplain's office complex and walk down an enclosed corridor to the rear room, the Chaplain's library.

Although defendant elicited testimony from several corrections officers that they had, at various stages of the investigation, previously given statements that Payant was seen elsewhere in the institution on May 15, 1981 after 1:00 p.m., none of the witnesses testifying at trial could recall with certainty seeing her alive after 1:00 p.m.

Some time after 1:00 p.m., an inmate knocked at the outer door to the Chaplain's office complex after hearing loud noises from inside. Defendant appeared from the rear office and, in a "nasty" manner, told the inmate to go away. That inmate later met a corrections officer in the hospital corridor, and the two of them proceeded back to the Chaplain's office to make phone calls. When no one answered their knock, they kicked the Chaplain's office outer door and it opened, a piece of cardboard falling out of the door. Once inside the complex, the corrections officer and another inmate who arrived shortly afterward noticed that the office was in disorder. The 55-gallon waste drum usually maintained in the outer alcove had been moved to the Chaplain's library, was about two-thirds

full, and had boards placed over its top.

Defendant returned to the Chaplain's office with a plastic object under his arm, and went into the rear room. He told the corrections officer he had to empty some garbage, and left with the 55-gallon drum, returning some minutes later. Defendant was observed by officers in the hospital corridor and the gate corridor dumpster area transporting large waste drums on a cart. The officers did not check the drums, which one officer observed to be filled to about nine inches from the top. The corrections officer and the other inmate left the Chaplain's office about 2:45 p.m., while defendant remained at the package room to empty the garbage, although defendant usually emptied the garbage there in the morning. This also

was the first time the package room officer could remember that defendant brought the Chaplain's office waste cart with him. The last sighting of defendant that afternoon was near the A block foyer around 3:25 p.m., when he asked a corrections captain to return a cart to the administration corridor or accompany him while he did so.

Although Payant never showed up for her assignments on May 15, her absence was not reported until approximately 6:00 p.m. Subsequent telephone calls and searches by corrections officers failed to locate her. At about 8:00 p.m., the inmates were locked in their cells.

The state police were contacted, and that evening a state police bloodhound unit arrived. The bloodhound was given Payant's scent and began his

trail at the westside corridor telephone where Payant received her call. On the first trail, the dog went from there up the westside corridor to D block, back down that corridor to A block, across the administration corridor, and up the eastside corridor. The dog paused and became visibly excited near an alcove in H block, then continued up the eastside corridor, out through the truck gates, back into the corridor, and up to the industry building, where he again became excited at an area on the second floor. The trail ended at the east side of the industry building. On the second and third trails, the dog took basically the same route, deviating only at one point to go into the A/B yard. After the dog completed his trails, he was led through the hospital corridor but exhibited no

excitement, even though Payant unquestionably was in the hospital corridor on at least two occasions that day. The dog was not taken through the Chaplain's office.

The institution's dumpsters also were searched that evening. Two corrections officers climbed inside some of the dumpsters and tried to examine the refuse. One officer saw some plastic bags in the gate corridor dumpster, but could not get at them. In the early morning on May 16, the institution's garbage truck was brought in, and the dumpsters at industry, the gate corridor, the mess hall and the administration corridor were emptied into the truck and compacted, while corrections officers shone their flashlights onto the garbage. The search failed to turn up Payant's body. Later that morning,

Green Haven's civilian garbage truck operator, accompanied by two corrections officers, took the truckload of garbage to a dump in Amenia, where the garbage was spread out and examined with the aid of a bulldozer. At that time Payant's body was found encased in three plastic bags, her hands tied behind her back, her clothes in disarray, and a cord tied around her neck. The location of the body led the truck operator to believe that it entered the truck via the industry or the first two gate corridor dumpsters.

Plastic bags and cord were present in the package room, and the cords in the venetian blinds of the Chaplain's office had recently been replaced by defendant and others. The plastic bags had been taped together by masking tape. Masking tape was kept in

the Chaplain's office.

Payant's indentification card and badge were found in a utility closet near H block on May 18. An examination of those items yielded insufficient fingerprints for any identification. Hairs were found near the door to the rear room -- the library -- of the Catholic Chaplain's complex, and also in the closet of that room. Examination showed those hairs to be microscopically similar to samples of Payant's hair, but it was not possible to make a positive identification. In addition, hairs were found in the belt buckle area and in the bra on Payant's body. Those hairs were found to be microscopically similar to defendant's hair, although again a positive identification could not be made. Several stains in the Chaplain's office tested for blood were negative. Some

scrapings from the office did reveal blood, but there was not sufficient quantity to determine its source or age. Dusting of the office and the 55-gallon drum for fingerprints produced nothing. The plastic bags, cord and tape found with the body of Donna Payant were also examined. While one plastic bag was similar to bags taken from Green Haven, the others were not. Although all eleven pieces of masking tape used on the bags were determined to be from the same roll, the ends of that tape could not be matched to the end of the roll of masking tape found in the Chaplain's office, which was of similar width. No fingerprints were found on the tape. The cord on the body did not match the cord removed from the Chaplain's office venetian blinds on May 27, 1981.

The first autopsy on Payant's

body was performed during the evening of May 16, revealing multiple injuries both before and after death. The pre-mortem injuries included injuries to the face and head which could have rendered her unconscious instantly, injuries caused by the cord around her neck and hands, and certain injuries on her chest, including a curvilinear erosion on the upper right portion and amputation of both nipples. The post-mortem injuries were consistent with the compacting and bulldozing of the garbage. The pathologist testified that his findings were consistent with the theory of the murder posited by the People.

A second autopsy was performed on May 19, 1981 by a pathologist who also reviewed photos taken at the first autopsy. He concluded that Payant had

died of strangulation. Most of Payant's pre-mortem injuries were found to be internal, which would not produce much external bleeding, including trauma to the head that could have caused rapid loss of consciousness. The pathologist was of the opinion that the amputation of the nipples was caused by a human bite and that the mark on the upper right chest, which occurred shortly before death, could have been a human bite mark. For this reason, he contacted a forensic odontologist. Because of the perceived importance of the wound on Payant's upper right chest, an expert photogrammatrist was employed to reproduce photographs of that area of her body in life-size. These and other materials subsequently were examined by several forensic odontologists retained by the People and by the defense.

The bite mark evidence was highly significant: if the curvilinear erosion on Payant's upper right chest was defendant's bite mark there was no innocent explanation for its presence there. The People produced four forensic odontologists (Drs. Homer Campbell, Arthur Goldman, Lowell Levine and Neil Riesner) who testified that the mark was a bite mark made by defendant. The prosecution's expert witness used two methods of identification. First, they compared a stone model of defendant's teeth, as well as impressions made in aluwax from the model, with the life-sized photograph of Payant's chest, identifying by visual observation individual characteristics of defendant's teeth such as shape of the arch and tooth shape, spacing and rotation, upon which their opinions were based. Second,

the prosecution experts made photo-to-photo comparisons of the Payant mark and a bite mark known to have been made by defendant on human tissue four years earlier. The expert witnesses for the defense -- three forensic odontologists (Drs. Haskel Askins, Lester Luntz and Irvin Sopher) -- were of the opinion that the mark was not defendant's bite mark, and indeed was not a bite mark at all. Their opinions were in large part based on a different technique involving the production of transparencies, made from a model of appellant's teeth, which were laid over the photograph of the mark on Payant's body. Although the defense technique was portrayed as a controlled method by which the results could be objectively evaluated, in fact the experts acknowledged that steps in the production of the transparencies

were subject to human variations and that, whichever technique was used, there was no completely objective method of identifying a bite mark. The methods used all depended in part upon expert judgments to establish relationships between teeth and marks.

Finally, the People introduced the testimony of an inmate (Robert DiBona) who was housed in the same unit as defendant. That inmate testified that on May 16, 1982, approximately one year after Payant's death and after defendant had been charged with her murder, he and appellant were speaking when defendant, who seemed to be in a very emotional state, "blurted out * * * that he was being driven and he couldn't help himself, that he had to do what he had to do," and that "he shouldn't never have made the phone call, that he deserv-

ed to die." The inmate believed that the reference to the phone call related to defendant's case.

The theory posited by the defense both at trial and on appeal is that Payant was murdered as part of a conspiracy among unknown corrections officers, who lured her to the eastside corridor area of the institution by the telephone call, murdered her in the H block or industry area, and placed her body in the Green Haven dump truck while it was temporarily abandoned. This theory, which defendant concedes is "bizarre," takes Payant far from her assigned area, and means that both Payant's murder and the hiding and disposal of her body occurred in relatively open areas to which many people had access. This would have required a truly substantial conspiracy, which had no

basis in the proof at trial.

The evidence linked defendant to the bite mark on Payant's body. The remaining circumstantial evidence established that defendant had both the opportunity, and access to the materials, for killing Payant and disposing of her body. We therefore conclude that the evidence was of such weight and credibility as to convince us that the jury was justified in finding defendant guilty beyond a reasonable doubt.

II

The various errors in the proceedings charged by defendant are without merit:

The Bite Mark Evidence

Defendant's major point in support of his request for a new trial concerns the admissibility of a photograph of a bite mark allegedly made by

him in August 1977 on the nose of another victim, Marilee Wilson. In its presentation of the case the prosecution originally set out to identify the bite mark on Donna Payant's body by comparing a stone model of defendant's teeth to a photograph of the mark on Donna Payant's body. However, Dr. Campbell, a prosecution expert, testified on cross-examination that, for purposes of identifying bite marks, human skin was the ideal material in which to take bite mark impressions. The prosecutor argued that in light of that testimony the People should be permitted to introduce the Wilson photograph for comparison of a bite mark by defendant in human skin with the Payant photograph. The court thereafter conducted a hearing out of the Jury's presence to determine (1) whether there existed an independent

basis for concluding that defendant was responsible for the Wilson bite mark and (2) whether such a photographic comparison of bite marks was scientifically acceptable, and it held that a black and white photograph of the Wilson bite mark, redacted so as to show little more than the mark itself, could be admitted and a comparison made to the Payant photograph.

Defendant argues that the evidence should have been excluded for three reasons. First, he claims that his alleged confession to the Wilson homicide either was not made or was obtained in violation of his constitutional right. If so, the only remaining evidence of his commission of the Wilson murder would have been the expert's comparison of the stone cast of his teeth to the photo of the bite mark. Such

evidence, defendant maintains, would suffer from the same flaw as comparison of the stone model of his teeth to Payant's photograph, and thus could not be admitted to corroborate that comparison. Second, defendant contends that the Wilson photograph was inadmissible because a photo-to-photo comparison is not a generally accepted scientific procedure for identifying bite marks. Third, defendant urges that even if the evidence were otherwise admissible, it should have been excluded because the danger of unfair practice outweighed its probative value.

At the hearing conducted to determine the admissibility of the Wilson bite mark photograph, State Police Investigator William Barnes testified that on August 22, 1977, he met with defendant and his attorney,

Sanford Rosenblum, to administer a polygraph test regarding the Wilson homicide. Barnes said he brought defendant to the polygraph room, recited the Miranda warnings, and conducted a four and one-half hour interview during which defendant confessed to the Wilson homicide but then refused to take the polygraph test. Throughout the interview Rosenblum sat in an adjacent room where he could see but not hear the interview. Barnes denied agreeing with Rosenblum that any statement defendant made would not be used against him, nor did he ever hear of any such agreement. Rosenblum's testimony contradicted Barnes. Rosenblum said he arranged the polygraph examination but had an oral understanding with Barnes that defendant's statement would be limited to other charges arising out of a kid-

napping and sexual assault on Mary Ann Maggio. Rosenblum testified he did not hear the Miranda rights administered, but could not hear the interview clearly because of static in the speaker system, and was told at the end of the interview that a polygraph test was not given because the length of time Barnes spent with defendant would have rendered any result suspect.

Supported by a full explanation of its reasoning, the court found Barnes' testimony credible and ruled that the People had sown by independent evidence that defendant was responsible for the murder of Marilee Wilson as well as the bite mark found on her body.

Defendant now argues that even if the confession was made, it was obtained in violation of his constitutional rights. Specifically, he claims

that the interrogation violated the Sixth Amendment right to the presence of counsel, the Fifth Amendment privilege against self-incrimination which could only be waived knowingly and voluntarily, the Station Constitutional prohibition of uncounseled waivers of the right to counsel, and the due process right to demand compliance with the terms of the agreement concerning the polygraph test.

Defendant's arguments assume that Rosenblum's testimony must be credited and Barnes' rejected. Having reviewed the testimony, we find no reason to disturb the conclusion of the trial court that Barnes was a credible witness. With the added benefit of having observed both witnesses as they testified, the trial court was justified in concluding that Rosenblum's testimony

may have been affected by personal concern about possible claims of inadequate representation, and that the arrangement as related by Barnes may well have been thought to serve defendant's interests at that time in establishing an insanity defense (see People v Smith, 59 NY2d 156). Crediting Barnes' testimony, it is evident that defendant was deprived of no constitutional rights. Appellant waived his Miranda rights and no agreement was breached because of the questioning regarding the Marilee Wilson murder. Nor was there any violation of defendant's right to counsel under the New York State Constitution since defense counsel agreed to the questioning outside of his immediate presence and placed no limit on the scope of the interview (cf People v Beam, 57 NY2d 241, 253-254; People v Yut Wai Tom, 53

NY2d 44). Thus, the trial court properly found that there was independent basis for concluding that defendant was responsible for the Wilson bite mark.

Similarly, there is no merit in defendant's second argument: that the technique of identification of the Payant bite mark by a photo-to-photo comparison with the Wilson bite mark was not shown to have requisite scientific acceptability.

The chief expert witness for the People, Dr. Levine,[2] testified that he could make a positive identification by comparing a photograph of a bite mark to a stone cast of teeth, but the best

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[2]The testimony of the remaining experts, both for the prosecution and for the defense, was substantially similar to that of Drs. Levine and Luntz, respectively.

means for identifying a bite mark would be comparison with another bite mark made in skin in similar circumstances. According to Levine, photo comparison of different bite marks on the same victim is an accepted technique. Levine testified that, though there has been little occasion for comparison of bite marks on different persons, among forensic odontologists such a procedure was reliable and accepted, and he named seven odontologists (there are 45 to 50 in the nation) who have recognized it. Levine had himself used this technique previously and on one occasion testified in court on the procedure. For the defense, the principal expert witness, Dr. Luntz testified that the comparison of a 1977 photograph of a bite mark on a nose with a 1981 photograph of a bite mark on a chest was not

generally accepted as a reliable technique for identifying the biter. He noted differences in the elasticity of skin and in skin properties depending on the affected area of the body, and observed that skin is not a good medium for registering bite marks. Dr. Luntz testified that photographs create distortions, but acknowledged that he had relied on a photo-to-photo comparison for purposes of excluding a suspect as the biter.

The court overruled defendant's objection to the evidence, reasoning that the photographic comparison was admissible here, as buttressed by identification through additional, more conventional means, such as (1) the comparison of a 1977 stone cast of defendant's teeth with a photograph of the 1977 Wilson bite mark, (2) the compari-

son of the 1977 cast with a cast of defendant's teeth taken in 1981, and (3) the comparison of the Payant photograph with the 1981 stone cast of defendant's teeth.

In People v Middleton (54 NY2d 42), this court recognized that identification of the perpetrator of a crime through bite mark evidence had gained general acceptance in the scientific community. "The test is not whether a particular procedure is unanimously indorsed by the scientific community, but whether it is generally acceptable as reliable." (Id. at 49.) The techniques employed in Middleton (photography, freezing of tissue specimens, taking of dental molds, visual observation) were approved by the majority of experts in the field as well as by appellate courts and therefore were accepted as generally

reliable without a hearing concerning the scientific principles involved.

The need for comparison of bite marks on different victims apparently arises infrequently, and there are no published standards governing the process. Middleton specifically mentioned the use of photographs as a generally reliable technique in bite mark identification. Moreover, this was not a situation, like Middleton, where techniques were accepted without a hearing. Extensive examination and cross-examination of the experts centered on methodology. The prosecution experts testified that the technique was reliable and accepted by the scientific community. The defense experts acknowledged the reliability and acceptance of photographic comparisons for exclusion purposed, and there was testimony esta-

blishing the reliability of such comparisons for inclusion purposes when bites appear on different parts of the body of a single victim. Given the acceptability of photographs for comparisons of bites on a single victim and the other evidence, we conclude that the process here was not significantly different. Indeed, because of a similarity in both the substance on which the bite marks were imprinted and the circumstances surrounding infliction of the marks, a photographic comparison could have a reliability not present with other techniques. We therefore agree that no error was committed in permitting the photo-to-photo comparison.

Finally, the probative value of the Wilson photograph outweighed its potential for unfair prejudice and was therefore properly admitted.

Evidence of uncharged crimes, though inadmissible to establish criminal propensity, is admissible if offered for some other relevant purpose (People v Allweiss, 43 NY2d 40, 46). One recognized ground for admission is to prove the defendant's identity, so long as identity is not otherwise conclusively established (People v Beam, 57 NY2d 241, supra; People v Condon, 26 NY2d 139). "In final analysis the process is one of balancing in which both the degree of probativeness and the potential for prejudice of the proffered evidence must be weighed against each other" (People v Ventimiglia, 52 NY2d 350, 359-360, supra).

The redaction of the Wilson photograph was so complete that little more than a jagged line representing the teeth marks appears, and the parties

were required, in the presence of the jury, to refer to the exhibit only as defendant's known bite mark in human tissue. Based on our own examination of the photograph, we find it highly unlikely that the jury could have drawn any conclusions about defendant's past acts of violence. Similarly, while a juror might perhaps have speculated as to the origin of the bite mark, the redacted photograph as well as the inocuous description were fully consistent with noncriminality and certainly conveyed none of the circumstances surrounding Marilee Wilson's brutal murder. Thus, the danger of unfair prejudice, if not eliminated, was minimal.

In characterizing the probative value of the evidence as negligible, defendant claims that the identification of the bite mark on Donna Payant's body

through a photographic comparison was cumulative (see People v Ventimiglia, 52 NY2d 350, 360, supra; People v Blanchard, 83 AD2d 905, 906). Prosecution experts did identify the mark on Payant's body by comparing it with models of defendant's teeth. But defense experts vigorously disputed this identification; moreover, testimony was elicited by the defense to the effect that human skin was an ideal medium for bite mark identification. In these circumstances, identifying the bite mark through another procedure cannot be dismissed as cumulative.

Defendant also argues that the comparison of the photographs was unnecessary because the prosecutor could have applied for a court order compelling defendant to bite into his own skin. Without determining that a

court order could have required defendant to bite himself with the force necessary to leave a mark like that present on Payant's body, no error was committed in not following that course. The mark left by defendant, who would have known both how this evidence was to be used and the precise method of infliction of the mark on Payant, could properly be regarded as not representative.

In light of the limitations placed on the prosecution's use of the Wilson photograph and the probative value in comparing the unknown Payant mark to one known to have been made by defendant in human tissue, no error was committed by the admission of that evidence.

The DiBona Testimony

Defendant contends that rever-

sal is appropriate because of a document discovered after trial which allegedly cast doubt on the testimony of the prosecution witness DiBona. DiBona testified that on May 16, 1982, during a recreation period, defendant made statements implicating himself in the murder of Donna Payant.

At some point in the prosecution, the defense submitted the following request for disclosure: "it would be appreciated if you would send to my attention Lemuel Smith's institutional record and the daily log book while Mr. Smith was housed in Cell Number 11." In response to this request the Special Prosecutor turned over excerpts from the SHU (Special Housing Unit) logbook, a detailed record of events such as meal periods, prisoner visits and inmate counts. The excerpts also reveal that

several recreation periods were conducted throughout the day on May 16. Two of these periods are reflected in the following entries:

8:50 PC[3] back from red.

8:55 PC to rec (6 inmates)

9:50 PC back from rec.

After trial, defendant himself obtained a "Chronological Report on Inmates Assigned to Special Housing Unit -- Downstate Correctional Facility." This report covers defendant's activities over a 24-day period and contains one or more entries for each day. It records such events as church visits, court appointments, showers and the administration of medication. Though the report does not disclose when defendant went to recreation, it does in-

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[3] "PC," denoting "Protective Custody," refers to the inmates.

dicate that he refused recreation ten times on nine different days during the 24-day period. The three entries for May 16 are:

9:30 AM	Seen Father Licata
9:35 AM	Med. from R.N.
2:20 PM	Call out to visit #2 Sgt. R...

There is no indication that defendant refused recreation on May 16.

Defendant moved, pursuant to CPL 330.30, to set aside the verdict because of this "newly discovered evidence."[4] The report, according to de-

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[4] In a noncapital case, "the power to review a discretionary order denying a motion to vacate judgment upon the ground of newly discovered evidence ceases at the Appellate Division." (People v Crimmins, 38 NY2d 407, 409.) Even in a capital case, this court has been most reluctant to substitute its discretion "to overturn the lower courts' exercise of discretion in denying a motion for a new trial upon the ground of newly discovered evidence." (Id. at 416.)

fendant, demonstrated that he did not visit the recreation yard on May 16 and thus could not have made the statements to DiBona. In reply, the People claimed that there was no indication of a request for this document and, in any event, the report failed to demonstrate that DiBona and defendant were not in the recreation yard at the same time. The court denied the motion, finding the evidence "ambiguous and of only speculative value." On appeal, defendant contends that the prosecutor breached his duty to disclose exculpatory material.

The suppression of exculpatory evidence in the face of a specific and relevant defense request will seldom, if ever, be excusable (United States v Agurs, 427 US 97; Brady v Maryland, 373 US 83; People v Cwilka, 46 NY2d 434). However, where the defense makes only a

general request, or none at all, the failure to turn over obviously exculpatory material violates due process only if the omitted evidence creates a reasonable doubt which did not otherwise exist. (United States v Agurs, 427 US 97, 112, supra.)

It would be inappropriate to apply the standard which obtains where the prosecutor had notice of exactly what the defense desired and suppressed it. Since the request did not put the prosecutor on notice that this specific document existed, he could have reasonably concluded that the disclosure of the SHU logbook satisfied the request. The record is devoid of any indication of prosecutorial bad faith or negligence. Thus, applying the Agurs standard, a new trial would be required only if the material were obviously exculpatory and

created a reasonable doubt not otherwise existing.

The report satisfies neither requirement. Initially, it fails to establish that defendant did not participate in the recreation period between 8:55 a.m. and 9:50 a.m. because he could have been called out of recreation to meet with the priest. The discussion between DiBona and defendant could have occurred during one of the other recreation periods that day. Indeed, to the extent the report sheds any light on the question whether defendant went to the recreation yard on May 16, the report implies that he did, since -- unlike the days when defendant refused recreation -- there was no record of defendant's refusal to attend recreation on May 16. Accordingly, the trial court properly denied this branch of defendant's motion

to vacate.

Additional Issues Supporting Request for New Trial

The Unusual Incident Report:

Corrections Officer Eric Johnson, a defense witness, testified that he was assigned to the F and G corridor during his 9:45 a.m. to 5:45 p.m. shift on May 15, 1981. Three days after the murder, on May 18, 1981, Johnson told police that on the day of the crime he observed Payant walking toward him shortly after 2:00 p.m. However, on September 18, 1981, he signed a statement indicating that this observation was made on the same day he assisted an inmate in setting a digital watch, an event which occurred on May 8, 1981, a week before the murder. In the midst of the prosecutor's summation, the defense obtained from a third party a copy of an "unusual

incident" report, containing the following notation, "2:08 (a.m., May 16, 1981) per conversation with Officer Johnson -- he reported seeing Officer Payant in F and G corridor at approximately 1:30 p.m." Counsel moved for a mistrial, arguing that the jury would have been much less likely to accept Johnson's story about the mix-up in dates had it been aware that a mere 12 hours after the observation Johnson said he saw Payant on the 15th. Any error in the proescutor's nondisclosure of this report was cured when the trial court interrupted the People's summation, allowed defense counsel to recall Johnson and place this evidence before the jury, and permitted him to address the jury on this issue before the prosecutor resumed his summation.

Recusal of the Trial Judge:

Defendant next argues that the trial judge should have recused himself for three reasons: he appointed the prosecutor whose conduct with respect to the submission of evidence to the Grand Jury was being questioned; he had exhibited hostility toward defense counsel in denying several pretrial motions; and he had been associated with the Special District Attorney, when, as District Attorney of Dutchess County, he had hired the Special District Attorney as an Assistant District Attorney. These claims are unpersuasive. A trial judge's impartiality is not undermined merely by appointment of counsel for one of the adversaries. Nor did the court exhibit bias in ruling on defense motions. To the contrary, the record demonstrates that the court dealt with defense requests in an evenhanded man-

ner. Finally, the decision on a recusal motion is generally a matter of personal conscience. While it may have been the better practice for the court to insure that defense counsel was aware of its previous relationship with the Special District Attorney, the association was not so substantial that the court abused its discretion in presiding over the trial. (Compare Corradino v Corradino, 48 NY2d 894; see also People ex rel. Stickle v Fay, 14 NY2d 683.)

Delay in Appointing Counsel and Disparity in Funding: Defendant challenges as violating his right to counsel the delay in appointing his present counsel and the disparity in funding between the prosecution and the defense. Defendant's counsel first appeared for defendant on June 10, 1981,

when appellant informed him that he lacked confidence in the Public Defender's office. Counsel declared in open court that he would serve without compensation. Some months later, however, he made the first of a series of legal moves to obtain compensation for his services. These requests were denied. In March 1982, defendant discharged counsel because of the funding impasse and the court appointed the Dutchess County Public Defender, who was unable to establish a meaningful attorney-client relationship with defendant. Finally, in September 1982, the court granted the Public Defender's motion to be relieved and defendant's counsel and his associate were appointed, with compensation at the established rates for defense counsel. Whatever other rights defense counsel may have

to receive increased compensation, in order to prevail on thie appeal defendant must show that his defense was ineffective as a result of the delay or disparate funding. Such a showing has not been made. Nor can the court presume that the alleged errors resulted in a denial of meaningful representation where our independent review of the record belies this conclusion.

Change of Venue: Prior to jury selection, defendant moved in the Appellate Division for a change of venue because of the great number of penal facilities in Dutchess County, the substantial impact of their presence on the economy of the community, the atmosphere of hatred and fear, and the danger of racism. We find no error in the court's conclusion that the application should have awaited the results of voir

dire (see People v Culhane, 33 NY2d 90; People v Boudin, 87 AD2d 133, 135). Since defendant failed to renew the motion following voir dire, there is no other ruling for this court to review (People v Parker, 60 NY2d 714).

Hypnosis Charge: Although several prosecution witnesses were hypnotized, the trial court determined that it would limit their testimony to events recalled prior to hypnosis, and defendant admits that the hypnosis issue was not a major factor before the jury. In People v Hughes (59 NY2d 523, 548), the court said that a trial court should instruct the jury that a hypnotized witness usually acquired a measure of confidence in events recalled under hypnosis -- if the defendant requests such a charge. Defendant failed to ask for this instruction, and its absence

from the charge does not warrant reversal in the interest of justice.

Further Cross-Examination of Goodman: The trial court did not abuse its discretion in prohibiting defense counsel from cross-examining Teddy Goodman more extensively about the details of his testimony at his own murder trial. (Goodman testified that on May 15, 1981, he saw defendant and Payant enter the Chaplain's office together.) Counsel had already mounted a substantial attack on Goodman's credibility and the limits placed on cross-examination regarding a collateral crime were not unreasonable (see Cohen & Karger, Powers of the New York Court of Appeals § 197, p 740).

III

Having found that the evidence was convincing beyond a reasonable doubt

and having discovered no error warranting a new trial, we turn to defendant's challenge to the constitutionality of New York's death penalty statute.

Defendant was convicted of murder in the first degree under section 125.27 of the Penal Law, which provides:

> A person is guilty of murder in the first degree when: 1. With intent to cause the death of another person, he causes the death of such person; and . . . at the time of the commission of the crime, the defendant was confined in a state correctional institution, or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the minimum of which was at least fifteeen years and the maximum of which was natural life, or at the time of the commission of the crime, the defendant had escaped from such confinement or custody and had not yet been returned to such confinement or custody; and . . .(t)he defendant was more than eighteen years old at the time of the commission of the crime.

Upon a conviction of first degree murder, the court must impose a sentence of

death (Penal Law, § 60.06).

Defendant argues primarily that the statute's failure to allow the sentencer to consider any relevant mitigating circumstances violates the Eighth and Fourteenth Amendments' prohibition of the infliction of cruel and unusual punishments.[5]

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[5] The People urge that defendant has no standing to attack the statute on this basis because he has not actually shown any mitigating circumstances, and the statute must be evaluated as applied to him. Where the statute is attacked because it affords no opportunity to show mitigating circumstances, a defendant can hardly be denied review for failure to show any. It would be nothing short of outrageous to put a defendant to death because his counsel failed to make an offer of proof of mitigating circumstances, when the statute did not permit the sentencer to consider any mitigating circumstances. Moreover, death penalty statutes have been reviewed without a specific showing by defendant that the constitutional defects actually prejudiced him. (See, e.g., Roberts v Louisiana (428 US 325), Woodson v North Carolina (428 US 280), and People v Davis (43 NY2d 17, supra).)

To prevail on this claim, defendant must overcome the strong presumption of constitutionality which attached to legislative enactments (People v Davis, 43 NY2d 17, 30, supra).

Mindful of the singular gravity of the death penalty, our legal system has struggled to accommodate the twin objectives of "a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." (Eddings v Oklahoma, 455 US 104, 110.) While not addressing the precise issue before us, over the past 12 years since Furman v Georgia (408 US 238), the Supreme Court in a line of decisions reviewing death penalty statutes, has defined the criteria required to meet these objectives.

In Furman, the Court nullified

a statute which gave the sentencer unguided discretion to decide whether to impose the death penalty. Although the five-Justice majority did not agree on a uniform rationale, the case is generally interpreted to prohibit the arbitrary and capricious imposition of the death penalty (see Gregg v Georgia, 428 US 153, 188, 195, 206). The Court provided further explanation of the constitutional requirements for death penalty statutes in a group of cases decided in 1976. Finding, substantively, that capital punishment was not a per se violation of the Eighth Amendment, the Court examined the procedures used in imposing such a sentence. A three-Justice plurality concluded that the concerns of Furman could be satisfied "by a carefully drafted statute that ensures that the sentencing authority is

given adequate information and guidance" (Gregg v Georgia, 428 US 153, 195, supra), and the Court upheld the "guided discretion" statutes of three states (Id.: Proffitt v Florida, 428 US 242; Jurek v Texas, 428 US 262).

However, the Court struck down two death penalty statutes which provided for a mandatory death sentence upon conviction for specified crimes (Woodson v North Carolina, 428 US 280; Roberts (Stanislaus) v Louisiana, 428 US 325). The Woodson plurality identified three independent deficiencies in a mandatory death penalty statute. First, in light of the Furman, such a statute violated the "evolving standards of decency which mark the progress of a maturing society." (Trop v Dulles, 356 US 86, 101.) The reenactment of the death penalty by some states after

Furman reflected attempts "to retain the death penalty in a form consistent with the Constitution, rather than a renewed societal acceptance of mandatory death sentencing" (Woodson v North Carolina, 428 US 280, 298, supra). Second, the mandatory death penalty failed to answer Furman's concern about unbridled sentencing discretion because jurors often vote to acquit despite sufficient evidence of guilt where the inevitable consequence of their guilty verdict is a death sentence. Third, a mandatory death sentence failed to allow for particularized consideration of relevant aspects of the defendant's character and record and the circumstances of the offense:

> While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we be-

> lieve that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see Trop v Dulles, 356 U.S., at 100 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. (Id. at 304.)

Because death, "in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two * * * there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case (id. at 305)." This sharpened need in the case of each irreversible execution precludes treating all persons subject to such penalty as "a faceless, indifferentiated mass" (id. at 304).

Even where the death penalty

statute was narrowly restricted to five defined categories of homicide, in Roberts (Stanislaus) the absence of meaningful opportunity for the sentencer to consider mitigating factors was considered a fatal infirmity:

> The diversity of circumstances presented in cases falling within the single category of killings during the commission of a specified felony, as well as the variety of possible offenders involved in such crimes, underscores the rigidity of Louisiana's enactment and its similarity to the North Carolina statute. Even the other more narrowly drawn categories of first-degree murder in the Louisiana law afford no meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender (Id. at 333-334.)

Subsequent decisions both in the Supreme Court and this court have invalidated mandatory death penalty statutes which do not permit consideration of mitigating circumstances, how-

ever heinous the crime. In Roberts (Harry) v Louisiana (431 US 633), the Supreme Court declared unconstitutional a statute which mandated a sentence of death upon a conviction for intentional murder of a police officer, stating that it was incorrect to assume that no mitigating circumstances could exist when the victim is a police officer. Among the circumstances which could be offered in mitigation were the offender's age and prior record, the influence of drugs, alcohol or extreme emotional disturbance, and "even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct" (id. at 637). "(I)t is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the

particular offender or the particular offense." (Id.) Following Roberts (Harry), this court in People v Davis (43 NY2d 17, supra) invalidated that portion of New York's mandatory death penalty which applied to the intentional murder of a corrections officer "plainly and simply and without verbiage, because the New York statute 'does not allow consideration of particularized mitigating factors' for purposes of 'the capital sentencing decision as to the particular offender,' it is unconstitutional." (Id. at 33.)

In Lockett v Ohio (438 US 586) the Supreme Court reviewed an Ohio statute which limited the number of mitigating circumstances which could be considered. As the plurality wrote:

There is no perfect procedure for

> deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments. (Id. at 605.)

A majority of the Supreme Court embraced this rule in Eddings v Oklahoma (455 US 104). Because the sentence of death was imposed without consideration of mitigating factors required by the Eighth and Fourteenth Amendments in capital cases, Eddings' conviction for murder of a police officer was set aside and the case remanded for consideration of all relevant mitigating circumstances. "By holding that the sentencer in capital cases must be permitted to

consider any relevant mitigating factor, the rule in Lockett recognizes that a consistency produced by ignoring individual differences is a false consistency." (455 US 104, 112, supra.)

Individualized consideration of the offender and the offense is simply a recognition that in every case there are invariably differences. In capital cases, where such consideration is constitutionally required, the purpose is to reduce the risk that the death penalty will be imposed in spite of factors about the person or the crime which call for a different penalty. The requirement is premised not on the fact that one class of crimes is more or less atrocious than another, or one category of defendants more or less sympathetic, but on the final, irrevocable quality of the death penalty. This same con-

cern necessarily pervades every capital case. Thus, under the standards established by the Supreme Court, any death penalty statute which did not provide for consideration by the sentencer of all relevant individual circumstances would be incompatible with the commands of the Eighth and Fourteenth Amendments.

But the issue on this appeal cannot be so readily resolved. The Supreme Court has repeatedly, without explication, stated that it was not deciding whether the Eighth Amendment forbids a mandatory death penalty for murder committed by a person serving a life term of imprisonment (Lockett v Ohio, 438 US 586, 604, n. 11, supra; Roberts (Harry) v Louisiana, 431 US 633, 637, n. 5, supra; Woodson v North Carolina, 428 US 280, 287, n. 7, & 292, n. 25; Gregg v Georgia, 428 US 153, 186,

supra).[6] This court also has expressly left the question open (People v Davis, 43 NY2d at 34 n. 3, supra).

In Lockett, the plurality hinted at a reason why such a departure from constitutional requirements could even be considered: "We expressed no opinion as to whether the need to deter certain kinds of homicide would justify a mandatory death sentence as, for example, when a prisoner -- or escapee -- under a life sentence is found guilty of murder" (438 US 586, 604 n. 11; see also People v Davis, 43 NY2d 17, 43 (Breitel, C.J., dissenting)).

If the Supreme Court indeed intended to limits its reservation to

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[6] In the Supreme Court's most recent decision on the subject, Eddings v Oklahoma (455 US 104), the majority did not perpetuate the reservation as to lifetime inmates.

the conceivable need for deterring murder by a life-term inmate with no possibility of parole, who could not otherwise be punished, then the reservation is not even applicable to defendant. Although the sentences for defendant's prior crimes were consecutive, they were imposed under section 70.30 of the Penal Law as it existed before the 1978 amendment. Thus, when he committed the present offense defendant was serving an indeterminate prison term with a minimum of 25 years and a maximum of life, and (according to defense counsel, undisputed by the People) had the prospect of parole in 2003, at the age of 63.

That, even in the case of life-term inmates, there may be penalties available to punish and thus deter further crime underscores the necessity,

in fulfilling the twin objectives of our capital-sentencing system, for requiring individual consideration of the offense and the offender.[7] In New York, a life sentence is not the necessary equivalent of life imprisonment. Diverse crimes are classified as A-1 felonies and thus punishable by a minimum sentence of fifteen years and a maximum terms of life (Penal Law, § 70.00), including arson (Penal Law, § 150.20), kidnapping (Penal Law, § 135.25, drug offenses (Penal Law §§ 220.21, 220.43), and persistent

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[7]While the dissent notes that evaluating deterrence and alternate punishments is for the Legislature, not the courts, such considerations are hardly to be ignored by us in light of the Supreme Court's reference to deterrence as a basis for its persistent "lifer" reservation (see Lockett v Ohio, 438 US 586, 604 n. 11). In order to determine the proper application of that reservation, it is obviously necessary to consider the basis on which it rests.

felony offenses (Penal Law, § 70.10; see also Penal Law, § 70.08). Life-term inmates thus include persons who have never before committed a violent act, and persons with a realistic prospect of parole. Even before reaching the invariable differences in the circumstances of the crime, it is obvious that life-term prisoners in this state are not "a faceless, undifferentiated mass." (Woodson v North Carolina, 428 US 280, 304, supra.) Given the Supreme Court's definition of the rationale underlying the requirement of individual consideration by the capital-sentencer, society has no less motivation to avoid irrevocable error in fixing the appropriate penalty for life-term inmates than other human beings.

Where the question is whether the death penalty is per se unconstitu-

tional, one can argue capital punishment is necessary to deter a person under a sentence of life inprisonment from committing additional crimes because any other sentence would be merely cumulative. This concern evidently led the Gregg Court, in its discussion of whether the death penalty was per se unconstitutional, to note that other sanctions may be inadequate to deter lifers. Indeed, the Supreme Court's reservation regarding life prisoners had its genesis in this discussion in Gregg v Georgia (428 US 153, 186, supra), and logically pertains to evaluation of the death penalty per se. But the distinction is not similarly meaningful where a statute is attacked only because the imposition of the death pentalty is mandatory.

Execution is never an inevit-

able consequence of a criminal act. In every case, including one where the death sentence is mandatory upon conviction, it is only the specter of execution which can serve as a general deterrent. In the process of investigation and adjudication, there are several points where the ultimate imposition of the death penalty may be precluded. Initially, the culprit rarely expects to get caught. Even if the defendant is apprehended, the Grand Jury may not indict for a capital offense, the District Attorney may consent to a guilty plea to a noncapital offense (CPL § 220.10), or the petit jury may return a verdict of not guilty. After conviction, an appellate court may reverse as to sentence or the Executive may commute the sentence. Thus, even where the death penalty is mandatory, its imposition,

in the eyes of an individual about to commit a crime, can never be more than a possibility.

Because execution is not inevitable, a discretionary death penalty, which allows for the consideration of the character as well as the record of the individual offender and the circumstances of the particular offense, differs little in terms of deterrence from a mandatory death penalty and does not in fact detract from the value of capital punishment as a deterrent. This conclusion is especially warranted upon the recognition that any defendant's status as a life-term inmate would constitute a powerful aggravating circumstance and undoubtedly increase the likelihood that the sentencer would find the death penalty appropriate under all the circumstances.

While the People suggest that retribution and the protection of prison guards and the prison population support a departure from constitutional command in the case of life-term inmates, these fail as bases for a principles distinction for the same reasons as relate to deterrence. Providing the sentencer with the option of imposing the death penalty is no less an expression of society's outrage, of its vital concern for the safety of prison guards and the prison population, and its resolve to punish maximally, than a mandatory death sentence. The sentencer merely is given the authority to impose a different penalty where, in a particular case, that would fulfill all of society's objectives. A mandatory death statute simply cannot be reconciled with the scrupulous care the legal system de-

mands to insure that the death penalty fits the individual and the crime.

The People argue that New York's death penalty statute is so narrowly drawn as to include by definition a consideration of aggravating and mitigating circumstances -- that the defendant's age, prior record of serious crimes and homicidal intent are all elements of first degree murder, and that the affirmative defense of extreme emotional disturbance is a built-in mitigating circumstance. Even if it were true, that the statute comprehended every mitigating circumstance a defendant might be able to show,[8] this precise

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*For example, mental defect short of insanity (see, e.g. Lockett v Ohio, 438 US 586, 612-613, supra), which is not specified in New York's statute, might be a mitigating circumstance. While the dissent takes comfort from the Supreme Court's approval in Proffitt v Florida

argument, urged also by the dissent, has already been rejected by this Court. In People v Davis (43 NY2d 17, 34, supra), we identified "the fundamental error" in built-in defenses: "defenses relate to guilt or innocence whereas a mitigating factor may be of no significance to a determination of criminal culpability * * * * The point is that what is urged in mitigation will

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(428 US 242), supra) of a death penalty statute which contained a limited list of mitigating factors, the Court later made clear that, in approving the Florida statute, "six members of this Court assumed * * * that the range of mitigating factors listed in the statute was not exclusive" (Lockett v Ohio, 438 US 586, 606, supra). Similarly, the Court's approval of the Texas statute in Jurek v Texas, 428 US 262, supra, rested on the conclusion of three Justices that the statute was broadly interpreted so as to permit the sentencer to consider whatever mitigating curcimstances the defendant might be able to show. (Lockett v Ohio, 438 US 586, 607, supra).

often not rise to the level of defense." (See also Roberts (Stanislaus) v Louisiana, 428 US 325, 332, supra.)

In sum, New York's mandatory death penalty is constitutionally infirm as applied to this defendant because of its failure to provide for the consideration of individual circumstances, one of the three deficiencies in the plurality opinion in Woodson.[9]

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[9]Our conclusion is consistent with the results reached by other courts. See Shuman v Wolff, 571 F. Supp 213, 217 (D Nev)(appeal pending)("imposing mandatory capital punishment for the life term prisoner who intentionally kills is to consider but one aspect of the character and record of the individual while ignoring totally the circumstances of the crime for which he is being sentenced"): State v Cline, 121 RI 299 ("a death sentence imposed by a sentencer who is not statutorily authorized to consider mitigating factors is a nullity"): Graham v Superior Court, 98 Cal App 3rd 880, 888 supra (a mandatory death penalty "is not sufficiently narrow to encompass a consideration of mitigating factors required for a finding of constitutionality").

In view of our conclusion that New York's statute contravenes the federal constitution, we do not reach the issue of the State Constitution's similar prohibition of cruel and unusual punishments (Art. I, § 5), or defendant's additional arguments that a mandatory death penalty for life-term inmates suffers from the other two deficiencies of a mandatory death statute identified in Woodson.

The Attorney General, relying primarily on People v Bailey (21 NY2d 588), argues in the alternative that the court should deem the death penalty statute to include a provision for consideration of mitigating circumstances and remit for a hearing. In Bailey, this court considered the validity of a statute which permitted the sentencing judge to impose an alternative indeter-

minate term of imprisonment upon sex offenders. Since additional findings were necessary before this alternative sentence could be imposed, a then-recent Supreme Court case (Specht v Patterson, 386 US 605) required a hearing. The court construed New York's statute in a manner as to uphold its constitutionality and read into the statute a requirement for a hearing. This reading was not inconsistent with the language of the statute. By contrast, section 60.06 of the Penal Law provides that "the court shall sentence the defendant to death" upon a first-degree murder conviction. The Attorney General's suggested interpretation is wholly at odds with the wording of the statute and would require us to re-write the statute. This we cannot do. (See State v Cline, 121 RI 299, supra;

United States v Harper, 729 F2d 1210).

Based on our review of the record, the People have established defendant's guilt of murder in the second degree (Penal Law, § 125.25 (subd 1)). We therefore modify the judgment by vacating the sentence of death, reducing the conviction to murder in the second degree, and remitting this case to the Supreme Court, County of Dutchess for resentencing and, as so modified, the judgment should be affirmed.

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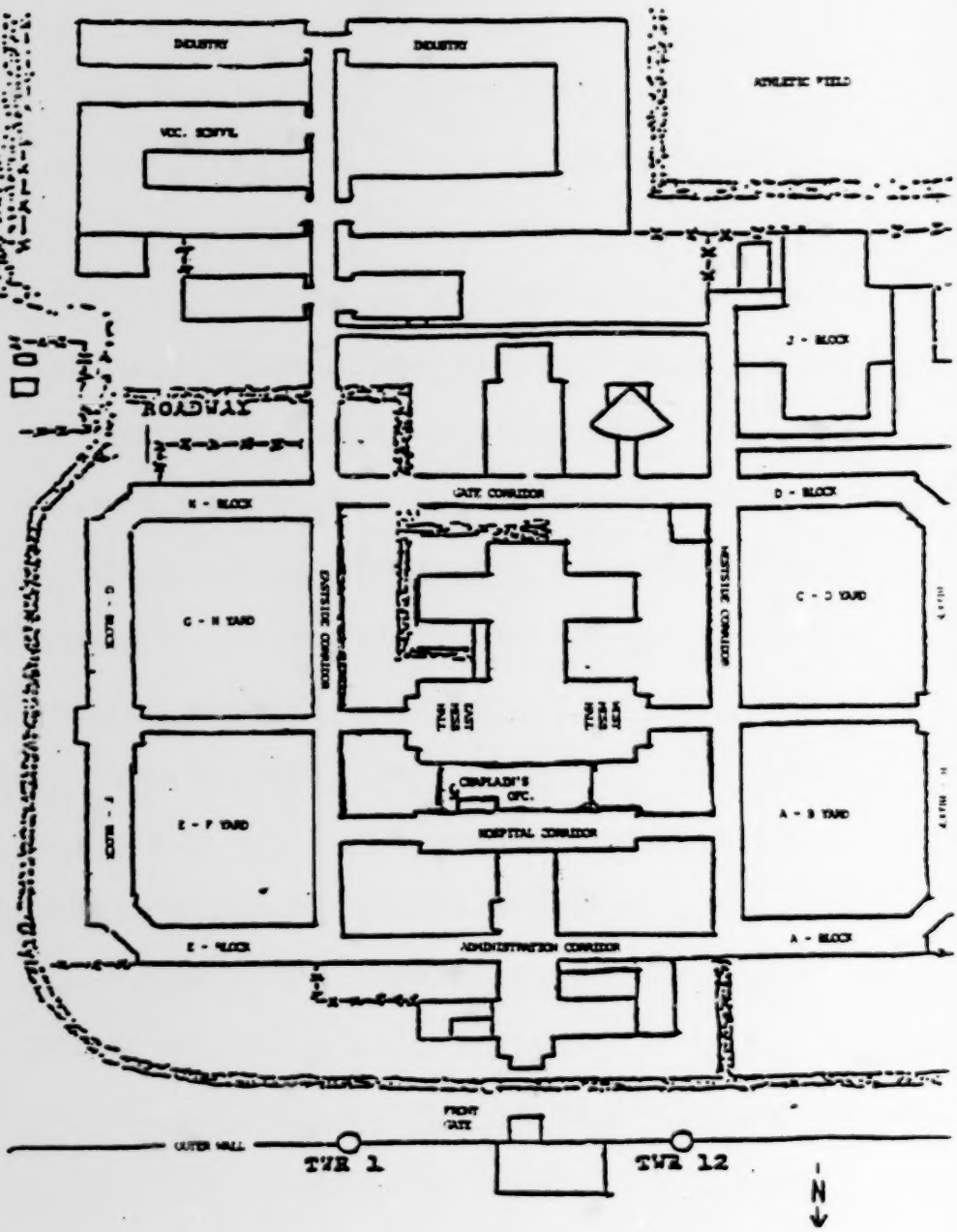

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DISSENTING OPINION OF SIMONS, J.

PEOPLE v SMITH

No. 235 - RDS

SIMONS, J. (dissenting in part):

I concur in Parts I and II of the majority opinion which hold that defendant's guilt was established beyond a reasonable doubt in proceedings free of error. I dissent, however, from Part III of the majority opinion because defendant has failed to establish that subdivision 1, par a, cl (iii) of section 125.27 of the Penal Law defining first degree murder is unconstitutional. I would therefore, affirm the judgment.

The legislative power of this state is vested in the Senate and the Assembly. Our task is, quite simply, to determine whether the Legislature in

exercising the power has violated the prohibition against "cruel and unusual punishments" found in the Eighth Amendment to the federal constitution, which is made applicable to the states through the Fourteenth Amendment (Robinson v California, 370 US 660). In doing so we are constrained by the strong presumption that the statute is constitutional and we may invalidate it only as a last resort (see People v Davis, 43 NY2d 17, 30; People v Nieves, 36 NY2d 396, 400; Matter of Van Berkel v Power, 16 NY2d 37, 40). The presumption arises because the Legislature has had the opportunity to investigate and study the need for the legislation and it has found circumstances warranting its enactment (Hotel Dorset Co. v Trust for Cultural Resources of City of N.Y., 46 NY2d 358). Thus, a heavy burden rests on one attacking the

statute to demonstrate that the legislators, as the elected representatives of the people, have exceeded their constitutional powers (see Gregg v Georgia, 428 US 153, 175; see, also, People v Scott, 26 NY2d 286, 291; People v Pagnotta, 25 NY2d 333, 337; Matter of Van Berkel v Power, supra; see People v Whidden, 51 NY2d 457, 462). Defendant has failed to do so.

It is now beyond question that, as a substantive matter, imposition of the death penalty does not violate the "cruel and unusual punishments" provision of the Eighth Amendment. Although capital punishment is not unconstitutional per se, it may become so if imposed when the nature of the crime involved does not warrant capital punishment (Edmund v Florida, 458 US 1140 (felony murder); Coker v Georgia, 433 US

584 (rape); see, also, Woodson v North Carolina, 428 US 280, 286) or when the procedure by which it is imposed does not meet constitutional standards. Because capital punishment may be imposed for intentional murder, our inquiry is directed to the prodecural aspects of the New York statute and whether they are constitutionally sufficient.

The general principle is that statutes permitting capital punishment must insure that it is not imposed "wantonly" or "freakishly" but in an objective, even-handed and substantially rational way (Furman v Georgia, 408 US 238, 309, reh den 409 US 902; see, also, Gregg v Georgia, 428 US 153 (plurality opinion), 188, supra). The statute must permit individualized determination to insure that the penalty fits not only the crime but also the criminal. The

jury should consider the aggravating details of the crime (see e.g. Lockett v Ohio, 438 US 586; Gregg v Georgia, supra; Proffitt v Florida, 428 US 242; Jurek v Texas, 428 US 262) and also relevant factors mitigating the offender's punishment (see Eddings v Oklahoma, 455 US 104; Lockett v Ohio, supra; Woodson v North Carolina, 428 US 280, 303-305, supra). The rule to be derived from the cases is this: state legislatures have discretion to determine the scope of the sentences to be imposed for violation of their criminal statutes provided that (1) capital punishment is not imposed for a broad category of homicidal offenses, (2) individual consideration is given to the offender and (3) the statute, except in the rarest tyoe of cases, permits the jury to consider any pertinent mitigating factors

(see Lockett v Ohio, 438 US 586, 603-604, supra; Woodson v North Carolina, 428 US 280, 287, 304, supra).

These past decisions are of limited value, however, because this appeal presents one of those rare homicide cases which the Supreme Court has not addressed.[1] Indeed the Court's decisions have specifically excepted from their reasoning and holdings mandatory capital punishment for a murder committed by a prisoner or escapee serving a life sentence (see Lockett v Ohio, supra, p 604, n. 11; Roberts (Harry) v Louisiana, 431 US 633, 637, n. 5; Roberts (Stanislaus) v Louisiana, 428 US 325, 334, n. 9; Woodson v North Carolina, supra, p 187; but see Eddings v Oklahoma,

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[1]At oral argument counsel could recall no similar New York homicide and only one foreign case has been called to our attention (see State v Cline, 397 A2d 1309 (R.I.)).

supra). And so have we (see People v Davis, 43 NY2d 17, 34, n. 3). Thus, our task is to analyze section 125.27 bearing in mind that we are addressing an issue the Court has not yet passed upon involving a particularized crime committed by a singularly circumstanced individual.

New York's statute provides that a prisoner serving a sentence of life imprisonment or an indeterminate term of 15 or more years to life who intentionally causes the death of another person is guilty of first degree murder (Penal Law § 125.27, subd 1, par a, cl (iii)) and shall be sentenced to death (Penal Law § 60.06). A finding of guilt must rest on evidence which includes proof that the defendant was more than 18 years of age at the time of the crime (Penal Law, § 125.27, subd 2).

Thus, the statute meets the first two constitutional requirements because it covers only intentional homicide and it includes within the definition of the offense individualized consideration of the offender: he must be an adult who has previously committed a crime of sufficient magnitude to warrant a maximum sentence of life imprisonment.[2] Furthermore, although the statute mandates exe-

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[2]These elements distinguish this subdivision of section 125.17 from the subdivision invalidated in People v Davis (43 NY2d 17, supra). The Davis decision actually involved two appeals, one from a conviction for killing a police officer, and the other for killing a correction officer. Defendant Davis' judgment of conviction was modified because of a failure of proof. In the companion James case, defendant was convicted to death. We declared the subdivision involved in that case unconstitutional because unlike this subdivision, it failed to take into account the character of the offender (Penal Law § 125.27, subd 1, par a, cl (i)).

cution, it does not violate the third condition because it defines a rare type of crime and its definition meets precisely the standard suggested for such cases stated by the Supreme Court plurality in Woodson v North Carolina (422 US 280, 287, n. 7), "an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence, defined in large part by the character and record of the offender." The Court has repeatedly stated that in such cases the jury need not be required to consider mitigating factors.

The Chief Judge would affirm on the ground alone, holding that the necessary import of the Supreme Court's statements indicates that the Legislature need not provide for consideration of mitigating factors concerning the defendant in this narrow category of homicide.

That may indeed be so, but we need not decide the point for our statutory scheme contains several limiting or ameliorative factors which may be considered before capital punishment is imposed. This legislative determination that the statute should not be mandatory in an absolute sense certainly does not detract from its constitutionality and indeed supports the conclusion that the statute is constitutional. Thus, there may be no conviction for first degree murder if the defendant was acting under extreme emotional disturbance or was aiding another to commit suicide (Penal Law, § 12.25, subd 2, pars (a), (b)), if his conduct was justified (Penal Law, art 35), if he acted under duress (Penal Law, § 40.00), if he lacked capacity (Penal Law, § 30.05), or if he was intoxicated at the time (Penal Law, § 15.25).

These statutory defenses are precisely the same circumstances, save two, as those suggested in mitigation by the Supreme Court in Roberts (Harry) v Louisiana (431 US 633, 636-637, supra), and recommended in the Model Penal Code (ALI Model Penal Code, § 210.6 (Proposed Official Draft 1962) as cited in Gregg v Georgia, 428 US 153, 193-194, n. 44, supra). Indeed our statutory scheme makes explicit more ameliorative factors than did the statutes approved in Proffitt v Florida (428 US 242, 248, n. 6, supra) and Jurek v Texas (428 US 262, 271-273, supra). The two circumstances listed in the Model Penal Code and the Roberts decision which are not expressly included in our statute are a lack of prior criminal experience and accomplice liability. Neither applies here. Before a defendant may be subject

to prosecution under section 125.27, he must have been convicted previously of a crime calling for imposition of a life sentence and he must murder while serving his sentence for that predicate crime. Thus, it is impossible for a person without any prior serious criminal involvement to be convicted of first degree murder under this subdivision. Indeed, this defendant had been twice previously convicted of murder and once of a rape-kidnapping. In each instance the sentencing judge had before him presentence reports showing defendant's prior criminal, social and medical history (CPL 390.30, 390.40) and in each case the court sentenced defendant to the maximum term permitted by law. In addition, the record shows that defendant has acknowledged responsibility for three other homicides and a second rape.

Prosecution was never started for one of those additional murders and the prosecution of the other two was discontinued because conviction would serve no purpose: defendant's sentence could not be increased beyond the sentence he was already serving because under the former statute the minimum terms merged. Manifestly, defendant had an extensive and serious criminal record at the time of this, his sixth, homicide. Nor must accomplice liability be considered as a necessary mitigating factor and defendant does not claim that it should. Thus, unlike the North Carolina statute which authorized capital punishment for murder generally and which was invalidated in Woodson because it did not provide for consideration of any mitigating circumstances, New York's statute not only comes within the exception stated

in Woodson, but it also provides several bases consonant with the rule stated in the Model Penal Code and other statutes approved by the Supreme Court cases on which the crime may be reduced to a non-capital offense. The New York Legislature has followed the general prescription of the Supreme Court's rules. It has made the permitted determination that because of the nature of this crime and the character of the offender, the mandatory death sentence may be imposed because of the singular nature of the offense. Extenuating circumstances are to be considered as defenses during the trial, not at a separate hearing. The Legislature's decision to leave the burden on the defendant to prove such circumstances as affirmative defenses, rather than to allow for their consideration as miti-

gating circumstances following a determination of guilt, finds support in the singular nature of the crime and the character and record of the criminals to which the statute applies, and in the exemption contained in People v Davis (43 NY2d 17, supra) and the Supreme Court decisions of such crimes from the general rule.

It should also be noted that New York courts when instructing a jury must submit for the jury's consideration any lesser included offenses (see CPL 300.50, People v Glover, 57 NY2d 61), and that a defendant in a capital case may appeal his conviction directly to this Court which then reviews both the law and facts and determines whether defendant's guilt has been established beyond a reasonable doubt (NY Const, art 6, § 3, subd 6; CPL 450.70). These

are important additional safeguards against the unbridled jury discretion and a verdict infected by caprice.

The majority contends that Lockett v Ohio (438 US 586, supra) controls this appeal. It sees no facts in the case significant enough to distinguish it from the accomplice liability involved in Lockett and although it notes that the court expressly reserved from that ruling a murder committed by one serving a life sentence, it holds that the reservation does not apply to this case because defendant was serving a statutory life sentence not a sentence for a term of his natural life (slip opn, p 31). No legal basis is given for that restrictive interpretation of the Court's language.

Relying upon Lockett (see, also, Eddings v Oklahoma, 455 US 104,

supra), the majority fault the New York statute because it does not permit the jury to consider mitigating factors to insure that the punishment is appropriate to this defendant. In Lockett the defendant was sentenced to death for the felony murder of a pawn broker accidentally killed by her confederates during the course of a robbery. She was outside the shop at the time of the robbery with the get-away car and her guilt rested on accomplice liability. At the time of her conviction, the defendant was 21 years of age, of low normal intelligence and had never been in serious trouble with the law before. Psychologists rated her chances at rehabilitation as favorable. She challenged the Ohio sentencing statute because it did not permit the judge to consider her character, prior record, age, lack of

specific intent to cause death, and her relatively minor part in the crime in mitigation of sentence. The Supreme Court, in a plurality opinion, declared the Ohio statute unconstitutional because it restricted the sentencer's consideration of mitigating factors (Lockett v Ohio, supra, 604). The Lockett holding has left in doubt prior decisions which appear to conflict with it (see e.g. Proffitt v Florida, 428 US 242, supra; Jurek v Texas, 428 US 262, supra). It should be obvious that it does not control this case because it is factually distinguishable from it and because the Supreme Court expressly reserved the application of that decision by stating that it did not pass on "whether the need to deter certain kinds of homicide would justify a mandatory death sentence as, for exam-

ple when a prisoner - or escapee - under a life sentence is found guilty of murder" (Lockett v Ohio, 438 US 586, 604, n. 11, supra). The Supreme Court has repeatedly included this exception in its decisions on capital punishment (see supra, p 3). We should not disregard it or strain to read more or less into the court's language to justify striking down this statute.

Nevertheless, the majority is persuaded by that decision that it was beyond the power of the Legislature to enact this statute requiring mandatory capital punishment because it suggests that retribution fails as a consideration in capital cases and because it finds that any deterrent effect of the statute in cases of less than life imprisonment is served by discretionary sentencing. The majority recognizes

capital punishment is not unconstitutional per se because it may be the only deterrent to some crimes, but then turning the reasoning around, it argues that mandatory capital punishment is not constitutional in this case because it is not the only deterrent available. It is not up to us, however, to reinvestigate the legislative determination that the death penalty is the only deterrent available for murders committed by prisoners serving life sentences. Once the Legislature decided to enact a statute calling for capital punishment, its validity rests upon the procedural safeguards built into it. Thus, the Supreme Court stated in Gregg that it is for the Legislature to evaluate the deterrent and retributive value of the legislation:

"The value of capital punishment as

a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.

...

In sum, we cannot say that the judgment of the Georgia legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular state the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

Finally, we must consider whether the punishment of death is disproportionate in relation to the crime for which it is imposed... (w)e are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of

> crimes" (Gregg v Georgia, 428 US 153, 186-187, supra).

Notwithstanding this language, the majority now evaluates the retributive and deterrent values of capital punishment and finds the penalty mandated by the New York statute disproportionate to defendant's crime. I know of no other punishment which this Court has struck down as disproportionate (see People v Broadie, 37 NY2d 100, 111).

Briefly, and without accepting the majority's premise, it should be pointed out that the retributive value and deterrent effect of capital punishment are valid sentencing considerations which the Legislature was entitled to weigh and accept when enacting the statute (see Furman v Georgia, 408 US 238, 394-395, supra; Roberts (Stanislaus) v Louisiana, 428 US 325, 353-355, supra

(White, J. dissenting); People v McConnell, 49 NY2d 340, 346; People v Suitte, 90 AD2d 80, 83-85; see, also, People v Gittelson, 18 NY2d 427, 432). Perhaps retribution when used in the sense of revenge is losing favor with the courts, as the majority contends, (see LaFave & Scott, Criminal Law, § 5, p 24), but it is accepted theory that an offender should receive a deserved punishment according to the gravity of his offense as the community perceives it. In that sense, i.e., society's response to the crime, not to the criminal, retribution remains an important penological consideration. Indeed, retribution supplies some of the rationale for the current nationwide movement towards determinant sentencing - a fixed period of incarceration for offenses, lengthened or shortened minimally by

consideration of a limited number of aggravating and mitigating factors (see Pugsley, Retributivism: A Just Basis for Criminal Sentences, 7 Hofstra L Rev 379). But critical to this appeal is the fact that retribution has nothing to do with the requirements of constitutional law and mandatory capital punishment may be imposed for purposes of retribution without violating constitutional precepts by recognizing the serious nature of the crime and the individual characteristics of the defendant.

Similarly, the majority challenges the deterrent effect of the mandatory sentence because defendant may be punished otherwise for the commission of this homicide by loss of parole or by pardon. To repeat, deterrence is not an issue for the Court, the Legislature has made that policy decision and it is not

charged with the burden of enacting a statute which invariably results in the least severe penalty having some deterrent effect (Gregg v Georgia, 428 US 153, 175, supra). But to the extent that the necessity of the statute as a deterrent may be considered to be before us, it should be noted that there are various forms of deterrence, specific deterrence to incapacitate the offender from repeating this or other crimes, and general deterrence, to deter others from committing similar crimes. The statute does serve the function of specific deterrence in this case. It prevents this defendant who has committed six murders and two rapes from killing again. The general deterrent effects of capital punishment on the population as a whole, in this case the prison population, is a subject on which

reasonable minds can differ but it is significant that the majority of American jurisdictions after studying the matter and reviewing the available evidence on the subject have decided certain crimes warrant capital punishment. This record contains no evidence to establish otherwise. Because the available evidence is unpersuasive and because reasonable minds may differ abou it, the subject is one appropriately left to the Legislature (see Gregg v Georgia, 428 US 153, 179, 186-187, supra; and see People v Broadie, 37 NY2d 100, 117, supra).

Several other grounds are urged for invalidating the statute.

The majority notes that homicide is not the only crime which may result in a life sentence in New York and that the statute may apply to many whose

predicate convictions are less egregious than are this defendant's. Insofar as that may be so, those cases are not before us. We are required to decide whether the statute is constitutional as applied to this defendant. He, of course, may argue that the statute is unduly restrictive as to him but whether it is unconstitutional when applied to others must await another day (see New York v Ferber, 458 US 747, 767; Broadrick v Oklahoma, 413 US 601, 610; United States v Raines, 362 US 17, 21; People v Parker, 41 NY2d 21, 24; People v Drayton, 39 NY2d 580; People v Broadie, 37 NY2d 100, 109, supra).

Next, the majority contends that mandatory capital punishment is wanton or arbitrary for a number of reasons: possible unevenness in the application and enforcement of the sta-

tute; the chance that the defendant may not be caught; the possibility of a plea bargain to a lesser charge or the possibility that the petit jury may refuse to convict (slip opn, oo 32-33). These arguments have been made and rejected before (see e.g. Gregg v Georgia, 428 US 153, 199, supra; Proffitt v Florida, 428 US 242, 254, supra; Jurek v Texas, 428 US 262, 274, supra; see, also, Roberts (Stanislaus) v Louisiana, 428 US 325, 348-349, supra (White, J. dissenting)).

Finally, the majority urges that the trial should be bifurcated to permit the submission of mitigating circumstances at a hearing rather than requiring them to be asserted as defenses at trial. Mandatory sentences are not necessarily unconstitutional, however (see Rummel v Estelle, 445 US

263; People v Broadie, 37 NY2d 100, supra; Matter of Dodd v Martin, 248 NY2d 398-399; People v Gowasky, 244 NY 451, 466), and although bifurcation may be a desirable procedure, it is not required, even in cases less serious than this one, involving murderers who do not kill while serving a life sentence (see Lockett v Ohio, 438 US 586, 605, supra; Gregg v Georgia, 428 US 153, 195, supra; see, also, People v Davis, 43 NY2d 17, 34-35, supra).

The disagreement in this Court, as in the Supreme Court (see e.g. Lockett v Ohio, 438 US 586, 628-636 (Rehnquist, J. dissenting), supra; Roberts (Stanislaus) v Louisiana, 428 US 325, 356-358 (White, J. dissenting), supra), is the extent to which mitigating factors must be considered by the court or jury before capital punishment may be

imposed. The majority hold that mandatory sentencing is not constitutionally permissible even in a case involving a murder by a prisoner serving a life sentence, that there must be a discretionary procedure which leaves the sentencer free to consider all factors mitigating defendant's crime. The Supreme Court has not adopted that rule. Indeed, the Court has scarcely been able to gather a majority for the rule that the sentencer must consider any relevant mitigating factors in cases involving persons not serving a life sentence who are convicted of murder. It did so only once, in a division of the Court that spoke more to the kinetics of the collegial decision-making process than certainty in the law (see Eddings v Oklahoma, 455 US 104, supra). Surely, considering this state of the law defendant

has not carried his burden of proving that the statute is unconstitutional and this Court should not declare it so.

There is a great temptation for judges to tinker with statutes to satisfy their own likes. Many, if given the opportunity to do so, might abolish capital punishment altogether or create a different sentencing procedure. But respect for fundamental rules of separation of powers, our positions as appointed judges and the legislators' roles as the elected representatives of the people, requires that we accept the legislative will. We must take the statute as we find it and interpret it according to existing constitutional standards. This statute meets those standards, at least defendant has not met his burden of establishing otherwise, and we should not "substitute

(our) judgment for that of the Legislature as to wisdom and expediency of the legislation" (People v Davis, 43 NY2d 17, 30, supra).

DISSENTING OPINION OF COOKE, Ch. J.

PEOPLE v LEMUEL SMITH

Case #235 -- L.H.C.

COOKE, Ch. J. (dissenting in part):

I respectfully dissent in part.

I would affirm the judgment of conviction and sentence imposed. There is no disagreement with the proposition that defendant's guilt was established beyond a reasonable doubt in a trial free of reversible error. I cannot agree, however, that section 125.27 (subd 1, par (a), cl (iii)) of the Penal Law is unconstitutional.

As recognized in the other writings, we must approach the constitutional issue with an acceptance that the State statute in question carries with

it a strong presumption of constitutionality, that it should be stricken as unconstitutional only as a last resort, and that courts may not substitute their judgment for that of the Legislature as to the wisdom and expediency of the legislation (People v Davis, 43 NY2d 17, 30, cert den 435 US 998). Furthermore, the question of constitutionality is a legal issue separate and apart from the topic of whether the statute, granted it is constitutional, is wise or advisable, which is a legislative responsibility (id, p 23).

Section 60.06 of the Penal Law provides that "(w)hen a person is convicted of murder in the first degree as defined in section 125.27, the court shall sentence the defendant to death." The relevant components of the first-

degree-murder statute (Penal Law, § 125.27) provide: "A person is guilty of murder in the first degree when: 1. With intent to cause the death of another person, he causes the death of such person; and (a) * * * (iii) at the time of the commission of the crime, the defendant was confined in a state correctional institution * * * upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life * * *; and (b) (t)he defendant was more than eighteen years old at the time of the commission of the crime." Certain affirmative defenses, further limiting the scope of the category for conviction of first-degree murder, are listed in subdivision 2 of the section.

It is clear that a majority of

the Supreme Court now hold that, generally, a death penalty statute, to be constitutional, must permit consideration of, "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" (Eddings v Oklahoma, 455 US 104, 110; Lockett v Ohio, 438 US 586, 604).

There is a legitimate exception to this general rule, which is embodied in the New York statute. As set forth by Judge Simons, the Supreme Court plurality in Woodson v North Carolina (428 US 280) referred to "an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence, defined in large part in terms of the character or record of the offender" (p 287, n 7). Although the death

sentences imposed there were set aside, the plurality was careful to point out that no opinion was expressed regarding the constitutionality of a mandatory death penalty statute limited to such a narrow category of homicide (id.). Such a reservation was also noted in Lockett v Ohio (438 US 586, 604, n 11 (1978), supra), and in Roberts (Harry) v Louisiana (431 US 633, 637, n 5 (1977)). In Roberts (Stanislaus) v Louisiana (428 US 325 (1976)), the plurality observed that a prisoner serving a life sentence presents a unique problem that may justify such a law" (p 334, n 9; see also, Woodson v North Carolina, 428 US 280, 295, n 25 (1976), supra; Gregg v Georgia, 428 US 153, 186 (1976); and People v Davis, 43 NY2d 17, 34, n 3, and at p 43 (Breitel, Ch. J., dissenting) supra).

Capital punishment is an ex-

treme sanction. As Judge Simons notes, it has been declared as "suitable to the most extreme of crimes" (see Gregg v Georgia, 428 US 153, 187, supra). "The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests" with the Legislature, which can evaluate the results of statistical studies in terms of conditions prevalent in the State and with a flexibility of approach that is not available to the courts (id., at p 186). The further presumption, that the Legislature has investigated for and found facts necessary to support the legislation (I.L.F.Y. Co. v Temporary State Housing Rent Comm., 10 NY2d 263, 269), should not be disregarded. Courts should not substitute their social beliefs and values for those of the Legislature (Ferguson v

Skrupa, 372 US 726, 730). There should be and need be no such substitution here.

It cannot be said that there is no rationale to justify the Legislature's imposition of the extreme sanction where a defendant intended to cause the death of a person and did cause the death of that person, where at the time of commission defendant was over 18 years of age, and where he or she was confined in a state correctional institution serving a sentence for an indeterminate term the minimum of which was at least 15 years and the maximum of which was life (Penal Life, § 125.27(1)(a)(iii)).* The need for discipline in our

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*As noted in the majority writing, defendant has been sentenced to three consecutive sentences of 25 years to life, once for kidnapping and twice for murder (see People v Smith, 59 NY2d 156, 160, 162, 163) imposed under former section 70.30 of the Penal Law. These sentences

State correctional institutions is urgent and obvious. The legislative prerogative and prescription of a deterrent limited to this "narrow category" in question, as further circumscribed by the statutory defenses, is compatible with the absolute necessity for order in state correctional institutions. At least, the Legislature could so find.

Although I arrive at the same result, I do not join in the dissent of Judge Simons, however, because one of its bases takes root in the affirmative defenses recited in the Penal Law. These are defenses, not mitigating circumstances. This court has already pointed out the difference: such defenses "relate to guilt or innocence whereas a mitigating factor may be of no

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merged into a single 25-year-to-life term.

significance to a determination of criminal culpability," and "statutory defenses alone do not take the place of a distinct consideration of mitigating factors" (People v Davis, 43 NY2d 17, 34, supra). "(W)hile there may be some visual or empirical satisfaction derived from counting and generally comparing the New York defenses with the mitigating factors indorsed by the Supreme Court, the fact is that these defenses do not require consideration of the character and record of the individual in respect to his sentence or punishment * * * New York's law does not permit a jury which has rejected these defenses and has found a defendant guilty of murder in the first degree to them mitigate the punishment by resurrecting the defenses" (id., at pp 35, 36). For affirmance, we cannot rely on a statu-

tory provision for mitigating circumstances, because there is none, and so, in that respect, the statute does not comply with the general rule enunciated by the Supreme Court (see Eddings v Oklahoma, 455 US 104, 110, supra; Lockett v Ohio, 438 US 586, 604, supra). This case, however, falls under an exception to that general rule as provided in the specified New York statute.

* * * * * * * * * * * * * * * * * * * *

Judgment modified and case remitted to Supreme Court, Dutchess County, for resentencing in accordance with the opinion herein and, as so modified, affirmed. Opinion by Judge Kaye in which Judges Jones, Wachtler and Meyer concur. Judge Simons dissents in part and votes to affirm in an opinion in which Judge Jasen concurs, and Chief Judge Cooke dissents in part and votes to affirm in a separate dissenting opinion.

Decided July 2, 1984.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS
----------x

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

LEMUEL SMITH
----------x

Dated: June 10, 1983

B E F O R E: HON. ALBERT M. ROSENBLATT,
Justice of the Supreme
Court

A P P E A R A N C E S:

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MARK GOMLINER, ESQ.

THE COURT CLERK: For sentencing, Lemuel Smith. Do you have any legal cause why sentence should not be pronounced, at this time?

MR. KUNSTLER: Judge, we have an application prior to this. We were served with a pre-sentencing memorandum. We are not moving to expounge that memorandum from this record. That's the prosecution's pre-sentence memorandum.

THE COURT: I've seen it. You have been served with it?

MR. KUNSTLER: Yes, we have been served with it. We don't know the motive behind it, whether it was to augment things, to assuage guilt, or to prejudice the defendant's appeal, but, as Your Honor has probably read it, it's filled with times that were either never charged to the defendant or where in-

dictments were dismissed, and it also talks about evidence that was not admitted at trial, which, if there's a re-trial in this case, may have serious effects on the re-trial. It was a needless cruelty, but it's a submission that is not called for, has nothing to do with the mandatory sentence, could not possibly influence it one way or the other, and we're moving for its expoungement.

Now Judge Charles Sifton in the United States District Court for the Eastern District of New York just did the same thing with a 105-page pre-sentence memorandum submitted by the United States attorney for the Eastern District of New York. In fact, he rebuked the United States attorney for submitting it and said he would not consider it at all and it should never have been submitted to

him. That was in a case where the sentencing is not mandatory at all, but it was much the same type memorandum.

In this case, if it's part of the appeal, it may be referred to in the appeal and may be part of the record that may be submitted to the Court of Appeals, and it can be nothing more than just prejudice the Court of Appeals to reach the point where the psychological import will be that Lemuel Smith is a terrible man and it doesn't matter what we do with the appeal anyway. I thought it was a needless cruelty to do it. I can't see what the purpose of it is since it can't influence you one way or the other since your task is a mandated one by the legislature, and I'm asking Your Honor to expunge it. Otherwise, it becomes part of the record in this case and may well have a disastrous effect

upon the appeal, and it's an unfair submission because it's meaningless. If it had anything to do with the type of sentence you would impose, I could see some sense to it, but it's a meaningless retaliation, and I think the design of it is to destroy the defendant's appeal because that's the only effect it could have really in this case because it goes up with the record to the Court of Appeals, who will thumb through autopsy pictures and so on in cases unrelated to this one, and it will have, I think on any human being a distastrous psychological effect. I'm asking you to expounge it. It has no meaning in this case. It was submitted, I think, with an evil purpose in mind. Because the sentence is mandated, how could it possibly effect you one way or the other? So, it can have no purpose but an evil

one. I'm asking Your Honor to expounge it, strike it from the record.

MR. MOROSCO: You Honor, counsel makes an oral application referring to authority without any previous notice. However, from experience, I'm reasonably sure that the case in the Federal Court that he is referring to is wholly distinguishable. We're operating under the New York CPL. The issue was before the Court, the Court denied the People's application for a pre-sentencing hearing and authorized a pre-sentence memorandum be submitted. I would note, in particular, that Mr. Kunstler here has not controverted any of the facts submitted in the pre-sentence memorandum and supported by oath. If he would, of course, then he would be in a position to ask for a hearing to controvert them. What he -- we believe that the pre-sentence memo-

randum completed the factual picture in this case and that this Court and any Appellate Court cannot be harmed but only benefitted by being made aware of all the facts surrounding this case. The suggestion that providing all the facts to the Court of Appeals will prejudice them against the defendant I submit is a self-defeating proposition. The same would go with respect to any other appellate court. As to what goes into the record on appeal, I would anticipate that there will be formal proceedings in the Court to settle the record. In any event, we submit there's nothing in law prohibiting the prosecutor in this State from submitting a pre-sentence memorandum, that the facts contained therein are accurate and uncontroverted, and there's no grounds for the application, at this point in the proceeding,

for an expoungement.

MR KUNSTLER: Just for the record, the only mandated aspect is the Probation Report. That is mandated even though similarly useless in this case. Judge, to say that the Court of Appeals is entitled to all the facts, they're entitled only to the record in this case and the record that went on in this Courtroom, not all the facts of everything beyond the Courtroom, and that's, essentially, what you're dealing with here.

Judge, I think you have an obligation to the defendant and to the law to expounge this from the record because they are, obviously, going to use it in their brief before the Court of Appeals. Mr Morosco has admitted that, essentially, by saying that they are entitled to all the facts. Even assuming

them to be facts for the moment, they are not entitled to all the facts. They are entitled to the record, which is the record of what went on in this Courtroom, and to have this sitting in the Courtroom, of course, available to the press and everybody under the sun I think is unfair, and in a death penalty case I think Your Honor has a greater responsibility to preserve this record and to keep it intact and not have it filled with the type of material contained in the pre-sentence report.

THE COURT: I'll take that under advisement because it would be more -- it would be addressed with somehat more circumspection at a proceeding in which I can settle the record, but I can't help but noting that the prosecution is going to have an opportunity to speak here and make remarks which I ima-

gine are going to be very much or similar to what is in here as part of the record.

MR. KUNSTLER: I think you should stop those, too.

THE COURT: No.

MR. KUNSTLER: I don't think they have a place in the Courtroom. You are allowing them, Judge, then to use the press to injure the appeal. They have no place in a mandatory sentencing whatsoever. They couldn't -- the purpose, Judge, of the prosecution speaking is to influence and persuade the Judge as to what sentence the Judge should give. There is no purpose here. They should sit silently here because you have a mandated sentence. You're going to impose the death penalty. So, what difference -- if you're going to give them a parade for the press, that's all

you will be doing if they speak and go through this material because it cannot influence your judgment one way or the other. It's a useless device. So, I'm asking you, Judge, to do both.

THE COURT: As far as their remarks go, I have no intention of foreclosing them from speaking here upon the sentencing. I think it's traditional and proper, and, as you yourself have so eloquently pointed out on earlier occasions, there's times when one speaks in Court for reasons other than sheer evidence, but with an idea towards public and social issues as well. I have no intention of foreclosing them, and I say it may be somewhat academic, but I will not deny your motion, at this point, but will deal with it on -- in connection with settling the record.

MR KUNSTLER: If you want, I

will submit it on written papers.

THE COURT: Well, you can, but I appreciate the --

MR. KUNSTLER: If you don't require it, I won't.

THE COURT: I think you have said everything. I think you made the point as well as it can be made on paper. I think the proper thing would be, on settling the record, I would deal with it, at that point, and I think, regardless of what happens, the Court of Appeals, certainly, at worst, can be cautioned this is something which you urge them not to read. I'm not saying that I will or will not let it in. I'm saying, that should be held in abeyance and not decided now on the spur of the moment.

MR KUNSTLER: Okay.

THE COURT: So, the Probation

Report has been furnished: the pre-sentence report has been furnished; the prosecution's memorandum has been delivered to the defense how many days ago was that? Several days ago I assume.

MR. KUNSTLER: It's dated the 6th of June.

MR. STANTON: Mr Gombiner was served on the 7th of June, Your Honor, at approximately 9 a.m.

THE COURT: I take it it's not your position you want to refute anything in here, you want to stand on your motion it be expounged?

MR. KUNSTLER: That's correct.

THE COURT: Okay. Now, the question was asked earlier about whether there was any legal reason to show why judgment and sentence should not go forward at this point, and I would like your response to that.

MR. KUNSTLER: There's no legal reason.

THE COURT: All right. Now, I'll hear from the parties, whoever whishes to speak, concerning sentencing, and, of course, the defendant himself by law has an opportunity to address any remarks that he chooses to make to the Court, and we will begin with the prosecution.

MR. STANTON: May it please the Court, I stand here today realizing the seriousness of the situation. When I was appointed Special Prosecutor or asked if I would consider being appointed Special Prosecutor, I thought about this very incident, standing here after a Jury returned a verdict of guilty where the punishment would be mandatory death.

To me personally, life is very

sacred, and I accepted the assignment knowing full well that some day I may be standing here before you, and I did that because of two things: The facts of this case and the brutality in which Donna Payant's life was taken and the past life this defendant has lived. For 25 years, he has caused nothing but heartache and terror. He has killed at least six people we know of. He has raped, robbed, kidnapped, sodomized a number of others. He has flaunted the law. He has laughed at society. He is, Your Honor, the essence of evil. He thinks only of himself, and he things of others as perishable by-products of an impermissible nature, and he has acted that way since 1958.

Your Honor, I know this defendant. I have lived with this case now for over two years. There is not

one mitigated factor or circumstance that I can find in his past. What the Court does today will not bring Donna Payant back to her family, and, as far as for the defendant, he also has a family, and they have suffered in the past, and they are going to continue suffering. So, this is really not a day of victory for anyone. We can try to look into the defendant's mind and see why he's done this in the past and why he has killed Donna Payant, and we can speculate if we want to, but, in February of 1979, after he was convicted of murdering Mrs. Byron and Mr. Hederman, on November 24, 1976 -- this was after he was released in October of 1976, from New York State Prison -- he was interviewed by Tracy Egan, a reporter for Channel 6 News, and this was aired one evening, and I saw it back in 1979 and

I remembered it, and she was asking him about his conviction for the murder of Byron/Hederman and about the other charges, the rape and murder of Joan Richberg, the brutal death of Merilee Wilson and about his being a suspect in the 1958 killing of Dorothy Waterstreet, and the defendant said to her, he said, the maximum sentence in New York is 30 years to life. Judge Clyne -- Judge Clyne was the presiding Justice at the Byron/Hederman homicides -- will probably give me four life sentences and 12½ to 25 or 25 to 50 years. He was talking about the robbery convictions. He then went on to say that -- and by "that" he was referring to the indictments for Joan Richberg, Merilee Wilson and the Doroth Waterstreet murders -- don't change the sentence I got any, not one bit. Tracy Egan then said, "No matter

how many times you're convicted of murder?" And the defendant said, "I'm going to be in jail the rest of my life, it doesn't change anything." Ms. Egan then said, "Do you think you'll die in jail?" And the defendant stated, "Of course. Do you think they'll let me out?" Your Honor, I think that goes a long way in analyzing why we're here today. I can only, after studying this case, and living with it, and knowing about this defendant and his past -- I can only think of a poem that T.S. Eliot wrote in which he said, "After such knowledge, what forgiveness?" I have nothing further to say, Your Honor.

THE COURT: Mr. Kunstler, I assume, from your earlier remarks, you have no interest in a pre-sentence report. That was the thrust of what I understood you to say at the time of the

earlier proceedings, but that opportunity, of course, does exist by law, and if there's any request for a pre-sentence conference or anything that the Court should determine by way of reconciliation of some dispute with the contents of the pre-sentence report, that is a right that the statute affords the defendant.

MR KUNSTLER: It's so academic that I think I just couldn't bring myself to even -- having looked through it, I don't want to look through it again. It's meaningless.

THE COURT: I understand that. The same goes for the statutory fine provisions, which the Court, naturally, will be waiving.

At this point, the defense, Mr. Kunstler, you have an opportunity to speak to the Court, to address the Court

concerning any matter regarding the sentencing, and I invite you to take the opportunity to do so.

MR. KUNSTLER: We have an agenda. Mr. Gombiner will address the Court first, then Mr. Smith and finally myself.

THE COURT: Okay.

MR. GOMBINER: Judge Rosenblatt, if you had a choice between life and death and you chose the death of Lemuel Smith, your decision will be applauded, defended, criticized and analyzed. The Courts and the public will come to judge the morality and wisdom. In the final ruling, Albert Rosenblatt and Lemuel Smith will eventually assume diminished roles. You will be known as the Court and Mr. Smith as the defendant. After that, principles of justice and law will govern the future of this case. Today

though is not a day for abstractions. Today, having been granted the power of life and death over Lemuel Smith, you have called for his death. Some will say you did so because the law commanded it; others because Donna Payant's murder demanded it; still others because Lemuel Smith's history required it. No reasons, however, will hide the fact that, on June 10, 1983, in the City of Poughkeepsie, Albert Rosenblatt deliberately, dispassionately and with the opportunity to do otherwise, acted to take the life of another human being. Others will speak more eloquently about the meaning of your choice. I can only feel shame at what you are doing and anger at the lack of courage that leads you to do so. Thank you.

THE COURT: Mr. Kunstler?

THE DEFENDANT: Your Honor, forgive me if I ramble because I'm not very fluent. But first, I would like to address Mr. Stanton's statement about the interview with Tracy Egan. As Mr. Stanton has known through the trial, he only let the public know what he wanted them to know and withheld the rest. That interview with Tracy Egan, I'm sure, is available to anyone. But I spoke to Tracy Egan about fingerprints that was found in the Hederman/Byron store that didn't match mine. I spoke to Tracy Egan about blood types that didn't match mine. Mr. Stanton didn't bring that up. Mr. Stanton feels that I should feel guilty for something I didn't do. He talked about the Hederman incident. Well, that was supposed to be a $20.00 robbery. Mr. Stanton didn't say I told her I just cashed a check that morning.

So, he's been very self-serving. Mr. Stanton has put purgered witnesses on the stand, and he's known they was purgered witnesses. And I believe the Judge knew they were purgered witnesses. And please do not believe that I am just saying this to be, you know, vindictive or out of anger. I wrote to Judge Rosenblatt on January 3rd and told him what he was doing to me. I told him he was denying me the opportunity to call witnesses. In June of 1981, the inmate/witnesses were willing to come forward and tell the truth about this incident. They needed to come out of state facilities or they would be killed. There's a female correction officer named Leslie Francis. She was willing to testify. There's been a great mystery about Leslie Francis. She saw Donna Payant that afternoon without her jacket. Not be-

cause of some hypothetical thing they dumped tons of garbage over it. These are State Police Officers that we're talking about for 20 or 30 years. They will misuse evidence like that. It's ridiculous. Everybody is talking about a sex crime. Why would it have to be a sex crime? The first pathologist that examined the body said there was no sex crime, and that's what he was looking for. You want to get into the Wilson case? Dr. Delgato, Dr. Katz, both testified about what they thought might be bite marks on the nipples of Donna Payant's body. Then, they brought in Dr. Baden out of New York, Dr. Levine out of New York and Major Sheenan (Phonetic) who was a Captain when I was Upstate, who prosecuted me on all these cases. He was at the second autopsy. Before that second autopsy was performed,

the Schenectady County D.A., John Poersch gave them teeth molds from 1977. If you been in Court and saw Dr. Luntz, his magnified view of the alleged bite mark on the body, you would see this mark comes over the top of another line, but Dr. Delgato didn't see this. He never showed Dr. Katz this because there was no bite mark there. As you heard, Dr. Sopher testified, the mark goes straight in. I defy any human being to bite straight in. But you can take a mold and push it straight in. Which was done. Why was it done? Because the prime suspect, in this case, is named Marty Rahilly. You had inmates. When they asked to take the inmates out of State facilities, inmates said they saw Marty Rahilly with a body in a plastic bag with the hands tied behond its back. Now, that information wasn't given to no-

body. But the State Police said this is supposition, they wasn't happy, and they changed their stories. Reese Grimstead, the man that came in and talked about how he got his watch and how Eric Johnson set his watch about a week before the day Eric Johnson testified he saw Donna Payant. But Reese Grimstead wrote to us in June talking about June, 1981, and said I got something to tell you, but the Judge wouldn't take him out of a State facility. So, Reese Grimstead gets a kidnapping charge and now he testifies for the State, but he wrote to us first because he knew they were framing me. All these things you don't know about. You didn't hear none of that. Why was Donna Payant killed? Think about it. Like the man just said, I told Tracy Egan I got so much time they can't do a thing to me. Why

would I have to kill? Think about it. Why would I have to kill? If I wanted some sex, I could rape, I could sodomize. They can't do nothing to me. Remember what Mr. Stanton says. But if I kill her, they kill me. He tried to tell you Smith knows the law, he knows he can't get no more time, but Smith knows if he kills a correction officer they will kill him. Why would I kill her? Think about it. You got halfway measures of this case. They didn't even know were legal in the institution, Lemuel Smith worked for the Catholic Chaplain then, they had a garbage can in the Catholic Chaplain's Office about that big. Every two or three days, with the Jewish Chaplain's Office we had about a 55-gallon can of garbage. It would go up front, and I would take it out to the back under escort. Nobody even thought

to ask the question: Wait a minute. Lemuel Smith takes the garbage out under escort, the Catholic Chaplain's Office really got to be filthy to have four or five 55-gallon cans of garbage every day. Where's the garbage coming from every day that I'm supposed to be taking outside? They lied. Out and out lied. And Mr. Stanton knew they were lying. I don't want to get on the inmates, but think about it. Who don't want to get out of jail? Who am I? Teddy Goodman made statements to inmates, "I won't let no nigger keep me in jail, I have a chance to go home." He made five prior statements he wasn't in the area. Officer Bourgal made a statement, Goodman, Henefeld , Rahilly, another inmate named Jack India were all in the area together, but Gilbert Henenfeld saw me up front at 1:00. He's got

X-ray vision like superman cause he saw through the control booth cause he couldn't see the gate he was talking about from where he was. Gilbert Henenfeld is on the street on parole. Teddy Goodman is on his way to the street. Think about it. I don't make excuses for things I've done. Check my record. He told you about it. Check it. Anything I've done I pled guilty to. Anything. Didn't fight it, didn't contest it. You're not trying me for my past record. You're trying me for the murder of Donna Payant, the lady that has three little kids out there that the State won't give a dime to. They're State kids. Mr. Stanton is a humanitarian. He works for the State. Yeah. Donna Payant was not killed in a sex crime. Donna Payant reported to the same Lieutenant Strack that helped the

District Attorney's Office and a Sergeant named Antidominico. Sergeant Antidominico got an attack like Leslie Francis. He's got amnesia. These two witnesses could have testified for the defense and proved that Donna Payant knew she was in danger and reported to the supervisors, and they never took her out of the facility. Why would they do that? Because Donna Payant had to go. The rumor about pictures of Donna Payant, it's true. But that wasn't so bad. The rumor about drugs, it's true. She knew that, but that wasn't so bad. The reason why Donna Payant had to die is because they had a fire in industry, the building burned up a million dollars worth of furniture and stuff that was stolen, to stop the IG investigation, and she was going to tell them because they were harrassing her. She had to go.

A sex crime is ridiculous. Do you think an inmate in a maximum security facility could take someone, kill them, put them in a 55-gallon drum, wheel it through open corridors that are wide open and put it in a dump? Why would he do all that? What is the reason for it? Defense lawyers can call witnesses that will lie because the laws involve money. But that dog didn't lie. That dog told the truth. That dog is the only witness you can say didn't get something. That dog went to H block. They found stuff in H block. So, they knew H block was part of the crime. Do you ever think, what would a Sergeant, two Lieutenants be looking through garbage cans for at H block? You heard Sergeant Duffany testify this garbage can looks suspicious laying on the side so I looked in it. But Mr. Kunstler pressed him. He

said, did you ever pass any other garbage cans. He said, yeah, sure. But he didn't look at those because H block was the area. H block was the area, the storeroom. They had a civilian named Peck that came by the storeroom after 3:00 that afternoon. The storeroom is always kept locked. It's a security area. The storeroom was open. It was open at 1:00, 2, because the officer working with Gary Golf (Phonetic), he reported it was open. Why was the storeroom open? Why did the State Police go to a great deal of measure? Why did the dog go crazy at the storeroom? Then, we go to industry. That's the next step the dog goes to. Remember, this dog doesn't find the body. The dog goes upstairs in industry. Low and behold, that's where Diaz works, upstairs in industry, the same shop. The dog goes

crazy up there. They take the dog away. The dog goes out in the middle of a driveway and stopped because that's where the body was picked up and put in one of the vans they were driving around there. That's why the dog didn't find the body, because they moved it. And they had time to move it because they didn't look for Donna Payant until 8:00 that night. And they knew she was missing. In fact, there was rumors in the yard she was dead by inmates. They couldn't say anything because the Judge wouldn't take them out of State facilities and they didn't want to die.

So, this case, like you heard a lot of one-sided things. I have been open to the press. I have been open to the Court. I even wrote the prosecutors and said, let's sit down and talk about this because you're persecuting me, I

didn't do this. Don't try me for what you think I did years ago, try me for this. I did not do this. I had no reason to do this. Donna Payant was killed to keep her mouth shut because they were blackmailing her. Yeah, they were passing her around. I'm the only one that stood in the Courtroom and defended the woman's honor because the woman wasn't a slut. She was being used. The woman called home every night she worked to talk to her husband and the kids. Every time she got a day off, she went home to be with her husband and kids. She was trying to get transferred to be with her husband and kids. Yet, she's sleeping with three different correction officers at the same time? The woman filed sexual harrassment charges at the academy. A female files charges, they will go back to the day she was born and

bring up all the dirt they can find. But she filed them because she was clean. A State Police report, they checked on Donna Payant from the year 1971. She ain't never messed around with nobody, not a sole. Her whole personality changes in three weeks. Not one man, three men, at the same time, on the sneak. She's trying to get back to Clinton. Clinton is a whole new town. She can't do this in Clinton. She never did it before. Yeah, I'm granted an animal. I've done some terrible things, some hidious things, things I have to face every day in the mirror, but we're dealing here with Lemuel Smith murdering Donna Payant. That's what I'm being tried for, not to judge with malice what happened in the Wilson case. Now, there's this decision in the Wilson case. Police Officer Bill Barnes comes up and

says, yes, Smith confessed to me during a lie detector test. I believed him. That's it. That was my trial. That was a trial by my peers. I'm guilty of the Wilson case. Yes, because he says so. That's what I was tried on here, the known bite mark in human flesh. There were 12, I think, intelligent people sitting there. (Indicating) Did any one of them believe that wasn't a bite mark from another crime? Every time a witness gets on the stand, wait, hold it, time out, we got to go back in chambers. They come back, and the first question Mr. Stanton asks is, "Well, have you ever seen this bite mark in human flesh before?" I mean, if it was just a thought-- I bite myself -- why you gotta adapt it and make a line on the chart? It had to be from another crime. Any juror that says they didn't know it was

from another crime is a liar. You had to know. And the Judge meant for you to know, and the prosecutor meant for you to know because they couldn't try me for the Payant crime because they knew; you better believe they know who disposed of the body. They knew it wasn't a sex crime. They knew that. Mr. Stanton, you know, like I don't want to seem like I'm getting on his case, but he came in hindsight. He did. He's a victim, too. But he's a political victim. The District Attorney set up this case. Oh, yeah, because Lemuel Smith didn't have any lawyers. Lemuel Smith had a public defender that stood in the Courtroom and trembled, that didn't even come to see about him. Lemuel Smith didn't have shit when he was charged with this. Lemuel Smith was arraigned by himself with his hands

cuffed behind him inside of the penitentiary. So, they knew Lemuel Smith don't have any defense, he's got a public defender. So, the District Attorney set this up. Mr. Stanton came in hindsight. Mr. Morosco, well, he knows that I called him unchristian in the Courtroom, but he's scum. No other way to get around it. The truth of the matter is, I've lied all my damn life. The last six years I didn't lie about nothing. What I did I did. They can kill me. You know wh· they can kill me? Because the Judge knows purgery was committed in this case. Oh, yeah. He's made very long decisions, page after page. What about DiBona lying? What about the prosecutor knowing? What about the records they held back? What about the State Police coming and getting the records and, periodically, turning them

over to the prosecutor's office? So, he knew I wans't in that yard. Mr. Kunstler asked the Judge for a hearing on the DiBona issue. No hearing. If you give me a hearing, how you gonna testify? I can call, you know, like ex-Governor Carey's secretary, he knew I couldn't get out of the cell block without a guard, the superintendent, Mr. Stanton, because he knew I couldn't get out of the cell block. The reason why they held back the records is because there's no Sergeant's name written on it -- I couldn't have been out -- or block officer. I can call a hundred witnesses from Down State and say, okay, now that we got this, DiBona committed purgery. But they're going to sentence me to die. Why would they have to commit purgery if I was guilty? Think about that. Here you got a man -- I've been accused of

everything, every heinous crime in the world. And I've done some, too. I'm not no young virgin running around here like I never did anything, I'm innocent, I don't have no sin on my conscious. I never said that. But, there's sin right there. (Indicating) You expect it from me. I'm a criminal. I been in jail 25 years of my life. You heard me. All my life. But he hasn't, and he can't go to jail now. He's going to sit there and make statements about me knowing that he put purgered witnesses on the stand. Knowing it. I should have a conscious? He's one of the upstanding citizens. There's a Judge up there knowing that purgery was committed in this trial and knowing that they wouldn't have to commit purgery if I was guilty. But he knew I wasn't guilty. Why Lemuel Smith? Why do they keep pick-

ing on this? What's that mean, different crimes? It's all one. The District Attorney, John Poersch, called him and told him this was a crime Lemuel Smith committed just as soon as he heard about the bite marks. Lemuel Smith did this. He called the State Police. He gave them the teeth molds, and the alleged area of interest came about on the body. Yeah, because there wasn't none. The pathologist told you there wasn't none. He called in a local dentist, too. There was no area of interest.

I'm not here to lie to you. You don't like me, you don't like me. So what? Like he said, I'm in prison for the rest of my life now because I just added an appeal and the guy just issued the ground. It was kind of foolish I had an appeal on this Federal homicide

up in the air and the Judged sentenced me to death. He said he couldn't grant it. He had to deny it. Do you all understand that -- because this is not the first time I've been prosecuted. This happened all my life. Let me tell you about a few of the crimes because I'm going to be in isolation for a long time. Like, I've lived by goals all my life. You know, I should throw the damn goals out the window. The trouble is people pay for what they did. Let's go back to the Waterstreet homicide. My best friend. Yeah. We slept in the same bed together, ate at the same table together. His mother treated me like her son. Then, all of a sudden, out of the clear blue sky, wait a minute, I've never been in any trouble. People say I was a basketball star. I had offers to go to college. I was going into my

sophomore year. My father was a minister. I had a Christian upbringing. All of a sudden, one night, after taking my girlfriend to the movies, I killed my best friend's mother. Think about that. Why? Why would I do that? Well, Smith got a split personality. Did you ever hear Smith say that? Smith's brother controls him. Think about that. Think about when this testimony came about that they're using here. Smith wasn't in the Courtroom. But they got Smith -- and I don't blame you all for being convinced -- they convinced me I was crazy, that I was doing something I knew I didn't do but I didn't remember. Think about that. And I never believed in brainwashing before. Believe me, I'm not a nice guy. Don't never thing I don't do what I feel is necessary, but I didn't kill Donna Payant. That's what Smith says. And I

got people that love me, too. I got a priest. The man treated me like a son. I would kill somebody in his office? You know the flack that he got for this? Think about that. Yeah, maybe I'm an animal. But I'm an animal with pride and dignity. You can't take that from me. None of you. I can die a man, believe me. But I've tried to live as a man, too. You can keep judging me for what I did in the past, you can keep judging me for what I was suppose to have done in the past, but judge me for the Donna Payant crime. Tell me why witnesses committed purgery. Tell me why they would put witnesses on the stand committing purgery. Political pride? My life ain't worth nothing. I'm a nigger. I'm in a penitentiary doing a thousand to life sentences. I'm an animal. All my crimes were against

white people. Kill him. He should have been dead years ago. But I didn't kill Donna Payant. That's the thing. Lieutenant Strack knew. He didn't get on the stand.

Let's dig up all the dirt, talk about how the Department of Corrections did it. Lemuel Smith is in Green Haven, three consecutive life sentences, 12½ to 25 in the can. What was I doing in Green Haven? All Smith had is a trial case. Smith stayed there eight months after the case was dismissed. What was I doing in Green Haven? The old cliche, money talks and bullshit walks. I paid to see. Ask Lieutenant Strack. That's why he didn't tell nobody. Ask Joe Keenan (Phonetic) why they set up the fire. I paid to see. Because the Department of Corrections is corrupt. That's right. It's a filth being supervised by filth.

You heard a man get on the stand and talk about ten years of drug transactions. Yet, they got 16-year old kids in jail doing life sentences for a joint or two joints. Think about that. How do you get in? Is he the only one? Of course not. You know, you might say this has nothing to do with the case, but it does. This is the case. This case is about Donna Payant was going to open her mouth. They were doing terrible things to that lady. She wanted to talk. She wanted to tell it, and she signed her own death warrant. Because she didn't know what she was in, she just got there, three weeks. She didn't know the system stunk. She didn't know they'd kill her. She figured she's defending herself. If you don't stop talking, I don't care. The Department of Corrections buries all the mistakes.

Like I said, find out about that fire that burned up that millions of dollars worth of material. It was lost in the fire. All through this case, Your Honor, I've stood in front of you and tried to act like a man. Sometimes I smiled, laughed, you know, but every smile isn't a happy smile. You sit up there now, and I really feel sorry for you because you can't focus on a career, you can't focus on a job more than you focus on a human being. You're going to sentence me to die and you know there's a good possibility I will die, but the thing of it is that you know I'm not guilty. And that hurts. Mr. Stanton, he got up and talked about me like a dog. Mr. Morosco has been doing that all through the trial. They know I'm not guilty. They know who are -- is guilty. But, I mean, think of that. How you

going to arrest a correction officer? Especially correction officers that wear white shirts. Every correction officer that was involved in this case, they got a promotion. Sergeant Duffany, who found the wallet, suspicious garbage can, he's a Lieutenant now. Lieutenant Strack, he's a Captain now. All the police officers, they got sweet jobs now. The inmates are on the street. You got an inmate that -- I mean, you've accused me of being a murderer. Brand me a murderer if you want. I'll be that murderer for a few seconds. Did I ever kill anybody I know? Did I ever kill anybody I call friends? Teddy Goodman did. He killed his own friend. Why? It wasn't just psychological. It wasn't through passion. It was for grieve. He wanted to burn down a building. Teddy Goodman stood there and sat on that stand

and told you, yes, Lemuel Smith and Donna Payant walked right past me. Don't you think there's only one way to come past? Officer Bourgal didn't see this. Gilbert Henenfeld said he saw me coming the other way. But Teddy Goodman saw me. And he was standing there, according to three or four statements, with Henenfeld, Rahilly and Goodman. The Judge wouldn't let Mr. Kunstler enter the prior statement in. So then we said, what the hell are they trying that for? It makes no sense. They changed time periods. Yeah. I read the lead sheets. The State Police will tell you they didn't know. But these is my records. Damn, look at all that shit that he did, he should be dead. Why mess with one of our outstanding citizens when we have him? Who the hell would believe him? Nobody. It's hard for me to believe so how could you believe it? The

Jury didn't believe it. The Jury didn't know. The Jury didn't listen. They focused on teeth marks from the prior case, a case that I was never tried for, a case that I was supposed to be tried for for eleven months and then the District Attorney changed his mind. Second degree homicide case I never been tried for. The excuse, Smith had trials in other countries. But that County had jurisdiction. They waived it. Because there was no case, that's why they waived it. But they used the publicity from that case to get me convicted in these other counties.

Let's go into statements, things like that. Smith made a statement, Smith tought he was crazy, at one time. Yeah. They had a woman that they passed off as a psychological friend, a social worker. I've just had an appeal denied

by ineffective counsel. You see, but everybody has a conscious. Sometimes the jurors have a conscious and they have to come back and see the final thing. They want to be sure they were right. You see, but this lady had a conscious also. She wrote me a letter, several letters, told me that she knew I would never make a statement about something I knew I didn't do or didn't know about. But my lawyer told her the statement would never be made public, never, This is for the psychiatrist because Smith needs help. The statement will never be made public, it can't hurt him. That's what they said. She was paid by the District Attorneys of two Counties. She was paid by two lawyers. I was going to trial on one of these cases I got life on. My lawyer came to me -- that was before this psychiatrist

testified -- and said, look, your mental condition is a little shaky. Now, this guy, when he testified about your relationship with your family -- the fact is that I have had family troubles, too -- he said, one guy, he never spoke again. I said, oh, shit, I want to get out there and get him back. He said, the best thing for you to do is don't be present during that testimony. Okay. You scared me now, I don't want to go crazy. So, I went into the Courtroom and I went and seen another good judge. I said, look, Your Honor, I researched the law and a defendant can be excused from a felony trial. I ain't even said nothing to him yet. The prosecution, oh, yes, we researched it, too. So, you know, things are made known in an intelligent waiver. All I got out of my mouth is I don't want to hear the man's

testimony. Okay. Not why, did anybody tell you to do this, were you influenced, nothing. Because they had to keep me out of the Courtroom. The reason why they had to get me out of the Courtroom was because my lawyer had told the District Attorney what the psychiatrists are going to testify, and he admits this in his summation. They don't care. They're above the law. The psychiatristgot on the stand. He needs help because he created a fantasy. He charged me with five homicides. He charged me with five homicides the Times Albany Union should know I didn't commit. Why? Because they had a description of the perpetrator in the Richberg crime, and they accused Lemuel Smith of it. The hell with Lemuel Smith. Well, they're wrong. I can prove it. I don't expect you to believe I can prove it, but I can prove everything I

said. I can prove Donna Payant was set up. I can prove she was ordered killed. Yeah. The only thing I can't prove is that I didn't do it. You have to take that on faith. If you take that on faith, you have to be saying, can that guy really believe in God, can he really atone for his sins. Does he have a right to change? But we gave him a thousand chances. Seventeen months he stayed out on the street. Shit, like 25 years, that ain't nothing. He ain't no good. You know, it's not just myself, I know I'm kind of long-winded, but I think you are entitled to know. I really do. You know, you can go around hating me, but know the truth. Hate me because I'm big, black and ugly. Don't hate me because of Donna Payant because I didn't kill her. Anybody, anybody that wants to sit down and talk to me in open conversation, I will talk to

to them. I'll tell them, the police, the District Attorney, who I offered to talk to, the Judge, anybody, I didn't kill Donna Payant. No, I haven't come into this Courtroom with my head hung down. No. Why should I be guilty? I didn't do anything. Think about that. Why was Rahilly fired right after the trial? They needed his testimony, that's why. Now, he's gone. And there will be more gone because the Department of Corrections don't care. You know, it's a thing where -- it's really a shame. Like Mr. Stanton said, I destroyed some lives. But you can destroy someone's life without taking it. Think about what you did to them for years and years to come. You see, once a person is dead, they don't suffer the pain. A person that's alive, they suffer for years and years to come. And I have done some foul things.

THE COURT: Mav I ask how long you intend to continue?

THE DEFENDANT: I don't know. I'll try to wind up if you're in a hurry.

The thing is that even you, Judge, you're going to go eat dinner tonight and say I did a good job, I did what the public wanted, and you have to look in that mirror, and God comes back to people. It's not always you that hurts. Sometimes, it's people that you love and care about. God is a just God. He knows I'm being persecuted, and he's giving me the strength to stand up. I can't talk. He's giving me the strength to tell you this. And it's coming out pretty good. Because it's true. So, you know, I guess there's not much more to say. But I want to read you part of my magazine. It goes like, "No man knows fear when his soul is pure, no man can be

confined when he's free in his mind, no man seeks success based on a lie, no man who loves God will ever die, no man expects justice for justice is a rare thing, and no man can ever be a slave when he has the heart of a king." Thank you.

THE COURT: Mr. Kunstler?

MR KUNSTLER: Judge, because I wanted my last words in this Courtroom to be exactly as I wanted them, I wrote them out, which I rarely do, but I felt the solemnity and the significance of this occasion called for something more than off the cuff remarks, and so I spent a considerable amount of time putting together the words which I have put down on paper, and, if Your Honor does not mind, I will read them rather than try to say them rrom memory.

In a very few minutes, this

Court will sentence Lemuel Smith, a black man, to die in the elctric chair. When it pronounces those awful words of condemnation, it will mark only the third time in almost two decades that a Judge of this State has done so. In the earlier cases, two other black men, who were convicted of the murders of a Yonkers police officer and a New York City corrections officer some ten years ago, were finally spared when the Court of Appeals held that the section of the Penal Law dealing with such homicides was unconstitutional.

The reason for such a decision was, in the words of former Chief Judge Charles Breitel, because the statute in question required "the mechanical application of circumstances surrounding the crime or the criminal." Just days ago, the Air Force Court of Military

Review, referring to the death penalty provision of the Uniform Code of Military Justice as "a fatally flawed throwback," invalidated it for exactly the same reason. This Court, on two occasions, has refused to seize the nettle and strike down the remaining portion of the New York Statute, dealing with murders by so-called lifers, which suffers from the identical constitutional infirmity. Accordingly, we stand here today to listen, in silent sorrow, while another white Judge carries out the terrible mandate of the law and sentences one more black man to death.

In England, the royal judges gave proceedings such as this an awesome and graphic solemnity by placing a black cloth over their wigged heads and sometimes pointing the tip of an unsheathed dagger in the condemned prisoner's

direction before imposing the dread sentence of death. On these shores, we have long since dispensed with such pomp and circumstance, and our sentencing sessions in capital cases are conducted with no more ceremony than other far less fateful court appearances. Yet, the result is the same -- the State is specifically authorized to terminate a human life.

I realize full well that my observations here today can have no effect whatsoever upon the words of death this Court will shortly utter. But, as Justice Felix Frankfurter poignantly explained, in an opinion protesting the hasty execution of Julius and Ethel Rosenberg almost thirty years ago this month, "history also has its claims." In making these brief pre-sentencing remarks, it is my desperate hope that

their import will travel far beyond the walls of this tiny Courtroom and perhaps reach the consciousness of a society which likes to pride itself upon its fervent dedication to the highest principles of ethics and morality.

The death penalty has ever been one of humanity's more tragic illusions. Throughout all recorded history, it has been proffered as a most effective deterrent to every crime from treason to pickpocketing. Despite all evidence to the contrary, many thoughtful and concerned people, the world over, panicked by what they perceived to be the seemingly inexorable increase in the crime rate, shocked by particularly heinous acts or frightened by real or imagined threats to their Country's national security, have acquiesced in the initiation, maintenance, restoration

or extension of capital punishment. In this nation, after an inspired hiatus of many years, we are now witnessing the wholesale return of the firing squad, the gallows, the gas chamber and the electric chair, to say nothing of such novel methods of taking life as the injection of lethal drugs, in the pathetic and mistaken hope that, somehow, the corpses created by these mechanisms will make the future safer for us all.

Over the centuries, in grasping for this illusory star, we have authorized our public executioners to draw and quarter, poison, press, crucify, impale, gas, beat, garrotte, burn, drown, guillotine, hang, starve, stone, shoot, bury alive, inject, disembowel, electrocute and cut the throats of hundreds and thousands of our fellow human beings. In so doing, we have rationalized our resort

to officially sanctioned murder by clinging to the earnest hope that the desired end of a relatively safe environment justified any means taken to attain it. What we fail to take into consideration, and even vociferously deny, is the existence within ourselves of the unreasoning need for revenge and retribution -- the eye for an eye and a tooth for a tooth structure of the Mosaic Code. However psychologically satisfying may be the fulfillment of such a compelling urge, it does nothing to advance the slow and halting progress of humankind to some dimly viewed, albeit deeply wanted and needed, concept of universal morality.

Some of those who favor the death penalty often ask its opponents whether they would feel the same way if the victim was someone dear to them.

Surely, ethical standards cannot be dictated by the grief or fury of those most immediately affected by a criminal act. As feeling persons, our hearts must go out to Donna Payant's survivors, but we simply cannot build the moral edifice of our civilization upon the transient emotions of those who have borne the outlaw's sting. Just as surgeons find it well nigh impossible to operate upon their own kin, so we must seek our El Dorado by the application of abstract rather than personalized principles of human conduct.

It has been a long and arduous journey up the mountain since our long forgotten ancestors first began to walk upright upon the face of the earth. Slowly but so surely, as rationality began to replace or temper superstition and mythology, we have managed to put

aside the devils and demigods who ruled our fantasy world of cause and effect in favor of analyses based upon the application of logic and reason. Unfortunately, we have not been able to subjugate all of our very real and pressing fears of the unknown and often unseen forces that seem to control or influence our destinies. Periodically, we yield to the compulsion of such terrors and burn our witches or our books until, at long last, our minds overtake our manias. Then shaken by shame and contrition, we vow that never again will we surrender to the primordial in our nature, a promise we somehow seem unable to keep for very long.

I am told that the Special Prosecutor, following the return of the jury's verdict, sought to find a church, presumably to give thanks to God for his

triumph or sanitize his role in obtaining it. Just as warring armies pray to the same divinity for victory, there is something so infinitely perverse in asking the Almighty to sanctify death. Perhaps guilt can be assuaged by seeking heavenly blessing on the well-intentioned evil we do to each other and our concepts of earthly Utopia, but its by-products, in cases like this are tragically irreversible.

For many months, I have listened to this Court extol the fairness of the trial of Lemuel Smith. At the same time, I have been witness to the deliberate withholding of crucial documentary evidence by the prosecution, the outright bribery of many of its key witnesses, and the commission of demonstrable perjury by some of them. In addition, the Court permitted the introduction of high-

inflammatory testimony and photographs upon untenable legal grounds, while, at the same time, restricting the cross-examination of many of the State's forensic experts and the only person who claimed to have seen the victim of this crime enter the Catholic Chaplain's Office on the day of her murder. Like beauty, fairness is in the eye of the beholder and my ground-level perception of the due process is considerably difference from that of the Court.

A word about the jury: Its members will have to live until they die with what they have done. I have no doubt that they, like the Court, which so effusively congratulated them after the rendition of their verdict, fully believe that their climactic conclusion was based solely on the evidence presented to them and no more. Nothing I say

here will ever convince them, or the Court, that they were influenced in any manner by what the New York Times in an editorial about juror's prejudice, characterized only last Sunday as their "subtler -- more easily masked -- racism," a cancer that has plagued our national community ever since the first slave ship sailed into a Virginia harbor more than three centuries ago. Only when all of us -- whites, blacks, browns, Indians, Asiatics and Hispanics -- begin to comprehend the depth of American racism and the role it has played in our history will we start the cleansing and healing process that may, some far distant day, make us a truly united people, at one with ourselves, and the rest of our species.

But arguments on this score, at this stage of the matter, or our civiliza-

tion, are essentially meaningless. What is significant is that we are, all of use, participants in a stark and deadly ritual, at the end of which is an oaken chair, long unused, just doors away from where it is claimed Donna Payant lost her life, capable of subjecting a human being to 2,000 lethal volts of electricity. For us, the defense lawyers, the agony is second only to that of the man we represent. No one who has not experienced the terrible responsibility of defending an accused in a capital case can possibly know or appreciate the inner anguish of hearing a jury foreperson utter the single, paralyzing word, "Guilty," at the end of such a trial. This is particularly true where, as here, the proof fell considerably below the reasonable doubt standard.

As professionals, we attorneys

always feel that we mist hide our true feelings at moments like this from the Court, the press, the general public and, difficult as it is, even the client. But all of us associated with the defense of Lemuel Smith, despite the gnawing ache in our hearts, are determined that we will not rest until we have done everything in our power both to exonerate him and to eliminate capital punishment in this State. We swear this to him, to ourselves, and to all those with whom we share this planet. Feeling as we do, we can do no other.

Now, Justice Rosenblatt, we have done with words and you must do what you must do -- punctuate the life of Lemuel Smith, a black American.

THE COURT: After having heard from all sides, Lemuel Smith, having been convicted of murder in the first degree,

as set forth in the indictment, the judgment of this Court is, as it must be, that the Defendant be turned over to the custody of the Dutchess County Sheriff, and then be delivered to the Superintendent of Green Haven Correctional Facility in the manner prescribed in the warrant which the Court is signing, and that he be kept there under the conditions prescribed in the warrant, and that during the week of July 10, 1983, the Defendant, Lemuel Smith, be put to death in the manner prescribed by law. You may be seated, if you like.

MR. KUNSTLER: We prefer to stand, Judge.

THE COURT: Okay. I pronounce this sentence in fulfillment of the duty with which I am charged. The Jury, before finding you guilty, had been informed that such a finding would signal

an automatic death sentence, with no discretion on the Judge's part. So that by their verdict, they had set the sentence on its unalterable course. It falls to me to announce it, a task which I undertake with no sense of satisfaction or vengeance, but in a spirit of humility that must accompany any action that deals with a human life.

At the trial, the Jury learned virtually nothing of your having committed murder after murder after murder, and yet they, in essence, condemned you to death. If our statute provided for a second stage trial in which the Jury would learn of your background, it is unimaginable that their condemnation would be any milder, or their intentions would be reduced were they now to hear second stage testimony as to a chilling catalog of rape, assault, mutilation, and

murder victims, whose bodies and families you have left in your criminal wake over a score of years.

Our criminal justice system has expended days, months, and even years in preserving your procedural rights. It is this very system which you have continually maligned, but which has consistently been vindicated, and which, as it must, has shown a fastidious concern for your life and liberty, in contrast to the disregard which you have shown to the lives of others, even before the Jury found you guilty of murdering Donna Payant. Now that they have done so, I impose the mandatory sentence, hoping that what society has decreed is philosophically right, but with the knowledge and consolation that this sentence is not imposed wantonly, or in response to a single aberrational act,

but upon one whose proven crimes of relentless violence our justice system has endured to what may well be an unprecedented degree.

If and when future generations should adjudge proceedings such as these, one hopes that they will not be viewed as capricious, or in derogation of life, but as the acts of responsible mortals whose strivings have yet to devise a ready means to safeguard the lives of more potential, innocent targets.

You have a right to appeal the sentence to the Court of Appeals, whereas, under ordinary circumstances, the appeal is to the Appellate Division. In this instance, the Notice of Appeal should be filed with the New York State Court of Appeals under Section 450.70, and the filing of such a Notice of Appeal under Section 460.40 provides an automatic stay

of execution. Beyond that, I don't feel it's necessary or appropriate to comment on the remarks that were made because I'm sure that this record will survive easily the remarks that were made against it so far as the attitudes of the participants are concerned.

MR KUNSTLER: For the record, I file herewith -- I think the filing must be with the Supreme Court of Westchester County -- a copy of my Notice of Appeal -- I'm sorry, Dutchess County, and I'm serving a copy on the District Attorney, and I'm filing a Notice of Appeal at this moment. A copy will be sent to the Court of Appeals.

(Handing.)

THE COURT: Yes. That will provide the automatic stay. Does anybody else have anything to say? Some members of the press asked me if a portion of my

remarks would be printed up so you have ready access to them, and I have them here. That concludes --

THE DEFENDANT: Excuse me. I have a question I want to ask. I heard you talk about the fairness of the trial, and I appreciate that. As far as the Jury making an absolute decision, I think they did on what they had. But, I mean, you said, if the Jury had known about the past murders, some of which I have never been convicted of, they would have come up with the same decision.

THE COURT: I didn't say that. That was not the thrust of my remarks.

THE DEFENDANT: What I would like to know, do you think that if the Jury knew that DiBona was committing purgery and the prosecutor was holding that back, do you think they would have found me guilty then?

THE COURT: Mr. Smith, I will not rehash all the witnesses and the proof. My own role in the fact-finding process was passive and dispassionate. The Jury had an opportunity to review all the evidence and, in essence, to hear the very arguments that you are making now, and I will not debate with you the correctness of their verdict because that was their task, that was their charge, they were honorable people and they did what they thought was factually correct. That concludes the proceeding.

The record should reflect the defendant should be made aware, as I'm sure that he is, that he has a right to the acquisition of free counsel if he can't afford one. I assume you will make the application to be continued to the Court of Appeals on his behalf?

MR. KUNSTLER: He has a letter that he is sending to the Court of Appeals on that issue.

THE COURT: He's aware of his right to obtain free counsel in connection with prosecuting his appeal to the Court of Appeals?

MR KUNSTLER: Yes, he is. I have so informed him.

THE COURT: All right.

MR. KUNSTLER: "Free" is the right word, too, Judge.

THE COURT: And to dispense with printing. Now, in view of the fact that the Notice of Appeal has been filed, that point is academic, but that would conclude it. Thank you.

* * * *

REPORTER'S CERTIFICATION

I, GUY FECAROTA, a stenotype reporter and Notary Public with and for the State of New York, do hereby certify that the foregoing is a true and correct transcript of the minutes recorded by me and reduced to typewriting under my supervision.

/s/ GUY FECAROTA

GUY FECAROTA

EXCERPTS FROM TRANSCRIPT OF A TELEPHONE CONVERSATION BETWEEN WCBS NEWSMAN DAVID LEVIN AND HOLD-UP MAN JOHN WOJTOWICZ WHO WAS HOLDING SEVERAL PEOPLE HOSTAGE AT A CHASE MANHATTAN BANK BRANCH IN BROOKLYN. (August 22, 1972)

JOHN WOJTOWICZ: Well, we were holding up a bank and we were on the way out until the stupid cop car pulled up in front.

LEVIN: What's going on now?

WOJTOWICZ: I walked in -- eh?

LEVIN: What's going on now?

WOJTOWICZ: We're waiting to negotiate the release of the people so we can get out of here.

LEVIN: Are you holding them hostage?

WOJTOWICZ: Yup.

LEVIN: Could you tell me how you're armed?

WOJTOWICZ: We have shotguns, we have rifles, we have pistols and we

we have a bomb.

LEVIN: How many hostages are you holding there?

WOJTOWICZ: 8 or 9.

LEVIN: And what are your terms for release?

WOTJOWICZ: Well, I want them to deliver my wife here from Kings County Hospital. When they deliver me my wife I'll release one of the hostages and then we'll negotiate from there; everytime they do something for me I'll let one of the people go."

. . .

LEVIN: Now after he's there and all the people are leased, do you expect to get your own release?

WOJTOWICZ: Let's put it this way: I expect to get out of here. Now I know they're going to get me sooner or later but they gotta play it cool. After

I release the last hostage then they can come and take us -- Right? There's no use blasting everybody in here because first of all the Supreme Court did away with capital punishment -- Right -- that means I can kill everybody in here and throw down the gun and walk outside and they can't shoot me and they can't give me the gas chamber, and that's why the Supreme Court's stupid.

LEVIN: Do you think that you would not have done this if the Supreme Court acted in another way?

WOJTOWICZ: Probably, then that's more risky; this way you don't have nothing to lose. It's stupid. O.K. I gotta go.

LEVIN: Just how many of you are in there now?

WOJTOWICZ: I can't tell you."

84-355

No.

Office - Supreme Court, U.S
FILED
AUG 29 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

against

LEMUEL SMITH,
Respondent.

Motion of New York Attorney General for Leave to Intervene

ROBERT ABRAMS
Attorney General of the State of New York, Attorney pro se *and for Intervenor in the court below pursuant to New York Executive Law, §71*
The Capitol
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PETER H. SCHIFF
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Appeals and Opinions

MICHAEL S. BUSKUS
Assistant Attorney General
Of Counsel

Dated: August 28, 1984

80pp

Question Presented.

Whether, consistent with the Eighth Amendment, a State may impose a mandatory death penalty for intentional murder by a life-sentenced inmate already serving a life sentence for prior intentional murders.

Parties.

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

1. Lemuel Smith, the defendant in a capital case.

2. The Special Prosecutor, William Stanton.

3. The Attorney General of the State of New York, Robert Abrams (the chief legal officer of the State [see New York Executive Law, § 60]), appearing in the court below by order of that court and pursuant to New York Executive Law, § 71.

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MISCELLANEOUS:

Stern & Gressman, *Supreme Court Practice* (5th ed., 1978), § 3.12, pp 185-186 2

No. 84-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984.

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

LEMUEL SMITH,

Respondent.

Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

Opinions Below.

The opinion of the Court of Appeals of the State of New York is printed in petitioner's appendix at pages 1a-56a.* It is reported at ____ NY2d ____, ____ NE2d ____, ____ NYS2d ____ (1984).

*Hereafter, all numerical references followed by "a" refer to pages of petitioner's appendix.

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Jurisdiction.

The remittitur (order and judgment) of the Court of Appeals of the State of New York was entered on July 2, 1984 (57a-58a).

This Court's jurisdiction is invoked under 28 USC § 1257(3), in that this petition is timely filed.

Although the court below directed a remand for resentencing (2a, 37a), no further action in the trial court will result in this case being more ripe for review at a later juncture. See, Stern & Gressman, *Supreme Court Practice* (5th ed., 1978), § 3.12, pp 185-186. The court below definitively resolved the sole federal constitutional question which is presented here (2a, 36a-37a). Resentencing, for a sentence less than death, was ordered by the court below solely because a bare majority thereof (4-3) felt so constrained by decisions of this Court (36a-37a). Nothing that might occur on resentencing will enhance the ripeness for review by this Court.

Constitutional and Statutory Provisions.

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

This case also involves the Due Process Clause of the Fourteenth Amendment, which provides:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law * * *."

It further involves the following provisions of New York Penal Law:

"§ 60.06 Authorized disposition; murder in the first degree

"When a person is convicted of murder in the first degree as defined in section 125.27, the court shall sentence the defendant to death."

"§ 125.27 Murder in the first degree

"A person is guilty of murder in the first degree when:

"1. With intent to cause the death of another person, he causes the death of such person; and

(a) Either:

(i) the victim was a police officer as defined in subdivision 34 of section 1.20 of the criminal procedure law who was killed in the course of performing his official duties, and the defendant knew or reasonably should have known that the victim was a police officer; or

(ii) the victim was an employee of a state correctional institution or was an employee of a local correctional facility as defined in subdivision two of section forty of the correction law,

who was killed in the course of performing his official duties, and the defendant knew or reasonably should have known that the victim was an employee of a state correctional institution or a local correctional facility; or

(iii) at the time of the commission of the crime, the defendant was confined in a state correctional institution, or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life, or at the time of the commission of the crime, the defendant had escaped from such confinement or custody and had not yet been returned to such confinement or custody; and

(b) The defendant was more than eighteen years old at the time of the commission of the crime.

"2. In any prosecution under subdivision one, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime except murder in the second degree; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime except murder in the second degree.

Murder in the first degree is a class A-I felony."

Other relevant statutes, reprinted in the appendix, include New York Executive Law, §§ 60, 71; and New York Criminal Procedure Law, § 450.70.

The relevant New York constitutional provisions, reprinted in the appendix, are New York Constitution, Article VI, §§ 3, 5.

Statement of the Case.

The pertinent facts are taken from the opinion of the court below.

A correction officer in the line of duty was murdered (2a). Defendant was then serving several concurrent life sentences for other intentional murders (2a, n 1; 32a-33a).

A jury convicted defendant of the murder of this correction officer (2a, 3a). A mandatory sentence of death was imposed, as required under New York Penal Law, §§ 60.06 and 125.27(1)(a)(iii) (see, 2a-3a).

On direct appeal, the Court of Appeals affirmed the conviction but declared the death penalty statute unconstitutional on Federal Eighth Amendment grounds (26a-37a).

Under New York's sentencing provisions, defendant's then-controlling life sentence, with minimum terms of 25 years, was the most severe penalty allowed by law, except for the narrow circumstances of a *further* intentional murder committed while such inmate was already serving a life sentence (2a, n 1).

As the court below explained, "[d]efendant was actually given three consecutive sentences of 25 years to life [for his prior murders], but they were imposed under section 70.30 of the Penal Law as it existed before the 1978 amendment (L 1978, c. 481, § 24), and therefore merged into a single 25-year-to-life term" (2a, n 1).

Apart from whatever additional sentence might be imposed on defendant for the affirmed conviction for the murder of the correction officer in the case at bar (37a), defendant would have been parole-eligible in 2003 (32a-33a).

Preservation of Federal Question.

Defendant's motion in the trial court to declare the mandatory death penalty statute unconstitutional on Federal grounds was denied (3a).

On defendant's direct appeal as of right to the Court of Appeals of the State of New York (see NY Const, Art VI, §§ 3, 5; NY Criminal Procedure Law, § 450.70) the Federal Eighth Amendment question was the only issue considered by the appellate court (see 26a-37a) other than the issues relating to the legal sufficiency of the proof (see 4a-25a). No State constitutional questions were decided, although defendant had advanced such an argument (36a-37a). The court below stated:

> "In view of our conclusion that New York's statute contravenes the federal constitution, we do not reach the issue of the State's Constitution's similar prohibition of cruel and unusual punishments (Art. I, §5) * * *." (36a-37a.)

Reasons for Granting the Writ.

This case presents the issue, previously left open by this Court, as to whether states may impose a mandatory death penalty upon life-sentenced inmates who commit a further intentional murder while in prison.

The death penalty decisions of this Court have settled many questions, but not the issue here presented.

In *Woodson v. North Carolina,* 428 US 280 (1976), this Court stated (p 287, n 7):

> "This case does not involve a mandatory death penalty statute limited to an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence, defined in large part in terms of the character or record of the offender. We thus express no opinion regarding the constitutionality of such a statute."

See, also, *Woodson, supra,* p 292, n 25. Likewise, other decisions of this Court have acknowledged the unique character of life-sentenced inmates insofar as they present an enhanced need for a deterrent effect. See, *Lockett v. Ohio,* 438 US 586, 604, n 11 (1978); *Roberts (Harry) v. Louisiana,* 431 US 633, 637, n 5 (1977); *Roberts (Stanislaus) v. Louisiana,* 428 US 325, 334, n 9 (1976); see, also, *Gregg v. Georgia,* 428 US 153, 186 (1976).

The specific reservation of that issue, and its presentment here in the case at bar, are sufficient reasons to grant a writ of certiorari.

Alternatively, and regardless of how this Court might rule on the merits of this issue, the express reservation of the issue caused a sharp split in the New York Court of Appeals in the case at bar. By the narrowest (4-3) margin, that tribunal split—and then only on a question of interpreting this Court's death penalty decisions. Compare the majority opinion (31a-37a), with the dissenting opinions (41a-47a; 53a-54a).

Finally, this Court has acknowledged its desire to provide some guidance in the area of death penalty jurisprudence. See, *Lockett v. Ohio,* 438 US 586, 602 ("The States now deserve the clearest guidance that the Court can provide * * *."). Only with clear signals from this Court will State legislatures know the limits of their authority.

While many States have repealed mandatory death penalty statutes in the aftermath of *Gregg v. Georgia,* 428 US 153, *supra,* such a legislative response is not necessarily a legislative judgment against a limited form of mandatory death penalty as applied to life-sentenced inmates. An equally plausible inference is that State legislatures, since *Furman v. Georgia,* 408 US 238 (1972) and *Gregg v. Georgia, supra,* have simply altered and re-altered their death penalty statutes in response to their perception of what was mandated by the decisions of this Court.

A life-sentenced inmate poses a unique problem for correctional authorities. See, *Lockett v. Ohio,* 438 US 586, 604, n 11, *supra; Roberts (Stanislaus) v. Louisiana,* 428

US 325, 334, n 9. It is in the public interest for this Court to clarify the law so State legislatures will know whether they may protect correction officers from life-sentenced inmates by the deterrent effect of a mandatory death penalty.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of the State of New York.

Dated: Albany, New York
August 27, 1984

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Counsel *pro se* and for Intervenor in the court below pursuant to New York Executive Law, § 71

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions

MICHAEL S. BUSKUS
Assistant Attorney General
Of Counsel

APPENDIX 1.

Opinion Below.

STATE OF NEW YORK

COURT OF APPEALS

SupC No. 235

THE PEOPLE &c.,

Respondent,

v.

LEMUEL SMITH,

Appellant.

(235) William M. Kunstler, Mark B. Gombiner, & C. Vernon Mason, NYC, for appellant.

William E. Stanton, Special District Attorney, Dutchess County (B. Anthony Morosco & Richard Schisler of counsel) for respondent.

Robert Abrams, Attorney (Michael S. Buskus, Peter H. Schiff, & Peter J. Dooley of counsel) *pro se.*

Jonathan E. Gradess, Albany, for NYS Defenders Assn. & Mitchell E. Karlan & John H. Hall, NYC, for NAACP Legal Fund *et al., amicus curiae.*

KAYE, J.

After a jury trial, defendant was convicted of murder in the first degree and sentenced to death. This direct appeal as of right by defendant (Const., Art. VI, §3, subd 6; CPL 450.70, subd 1), the lone resident of New York's death row, presents three questions: (1) whether the evidence was sufficient to prove his guilt beyond a reasonable doubt; (2) whether alleged trial errors deprived him of a fair trial; and (3) whether the state's mandatory death sentence (Penal Law, §60.06) for one convicted of murder while "confined in a state correctional institution . . . upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life" (Penal Law, §125.27, subd 1, par [a], subpar [iii]) is constitutional. We conclude that the evidence was sufficient to prove defendant's guilt beyond a reasonable doubt and that the court below committed no reversible error in the conduct of the proceedings. We also conclude, however, that New York's mandatory death penalty law is unconstitutional. For these reasons we modify the judgment by vacating the sentence of death, reducing the conviction to murder in the second degree, and remitting the case to the Supreme Court, Dutchess County for resentencing and, as so modified, we affirm the judgment.

In May 1981, Donna Payant was employed as a corrections officer at the Green Haven Correctional Facility in Stormville, New York, where defendant was serving an indeterminate sentence of 25 years to life.[1] Some time after reporting for work on the afternoon of May 15, 1981, Payant disappeared. Her body was discovered the next

[1]Defendant was actually given three consecutive sentences of 25 years to life, but they were imposed under section 70.30 of the Penal Law as it existed before the 1978 amendment (L 1978, c. 481 §24), and therefore merged into a single 25-year-to-life term.

morning at a landfill in Amenia, New York, when refuse from Green Haven was dumped and examined. An autopsy revealed that she had died of ligature strangulation.

Three weeks later, an information was filed in Beekman Town Court accusing defendant of Payant's murder and charging him with violation of section 125.27 of the Penal Law, a felony which mandates a sentence of death upon conviction. The Dutchess County Grand Jury indicted defendant in October 1981. Because of a potential conflict involving the Dutchess County District Attorney's office, a Special District Attorney was appointed by the court, and at a later date defendant's present counsel were appointed pursuant to County Law article 18-B. Defendant's pretrial motions to dismiss the indictment, for recusal of the trial judge, and for a change of venue were denied.

Defendant's trial commenced in January 1983. On April 21, 1983, after three days' deliberation, the jury returned a verdict of guilty. Defendant's motion to set aside that verdict was denied, and on June 10, 1983 he was sentenced to death. This appeal followed.

The People's case consisted of circumstantial evidence showing that Payant's known movements at Green Haven on May 15, 1981 brought her to an area near the Catholic Chaplain's office, where defendant worked that day, that Payant and defendant had previously spoken, that Payant and defendant were observed entering the Catholic Chaplain's office together on the day of her disappearance, and that defendant had access to a room (the library of the Chaplain's office) to which he could have lured Payant and killed her in relative seclusion, to materials (cord, plastic bags and masking tape) similar to those with which she was killed and her body was wrapped, and to vehicles (a large waste drum, a cart for moving refuse, and trash dumpsters) for disposal of her body. The People also introduced testimony of an inculpatory admission defendant made to a fellow inmate

approximately one year after Payant's death, and expert testimony that a pre-mortem wound on Payant's chest was a bite mark made by defendant.

Defendant at trial showed that several corrections officers had made prior statements that Payant had been seen at various points of the institution on May 15 after the alleged time of her murder, and that the investigation of Payant's death had produced no evidence—save the bite mark—connecting defendant to Payant's murder. The defense introduced its own expert testimony to show that the mark on Payant's body could not be attributed to defendant, and indeed that it was not even a bite mark.

As discussed in the ensuing sections, we conclude that defendant's guilt was established beyond a reasonable doubt, that there was no reversible error in the conduct of the trial, and that the mandatory death penalty statute is unconstitutional.

I

On this appeal from a judgment of death, the New York Constitution empowers us to review the facts (NY Const, art VI, §§ 3, 5). The scope of our inquiry has been defined in *People v Davis* (43 NY2d 17, 36, cert denied 435 US 998) and *People v Crum* (272 NY 348, 350):

> A review of the facts means that we shall examine the evidence to determine whether in our judgment it has been sufficient to make out a case of murder beyond a reasonable doubt. We are obliged to weigh the evidence and form a conclusion as to the facts. It is not sufficient, as in most of the cases with us, to find evidence which presents a question of fact; it is necessary to go further before we can affirm a conviction and find that the evidence is of such weight and credibility as to convince us that the jury was justified in finding the defendant guilty beyond a reasonable doubt.

Even in a capital case, however, "this court should not readily interfere with verdicts of jurors who have had the advantage of seeing and hearing witnesses." (*People v Crum*, 272 NY 348, 357, *supra*.)

The People's theory is that defendant killed Payant in the early afternoon of May 15, 1981 inside the Catholic Chaplain's office complex, wrapped her body in plastic bags, placed the body in a 55-gallon waste drum, and dumped it into a dumpster maintained for the disposal of trash, from which it was collected and later discovered. Upon our review of the record, we conclude that the evidence supported this theory and was sufficient to make out a case of murder beyond a reasonable doubt. The evidence which in our view justified the jury in finding defendant guilty may be summarized as follows.

Donna Payant began her career at Green Haven some two months before her death. She had spoken with defendant on at least two occasions prior to the date of her disappearance: once when she told him she admired a religious article he had crafted and he in turn told her that he worked in the Chaplain's office, and a second time when they spoke in an area of Green Haven's hospital corridor, near the Chaplain's office, on May 12, 1981. (A diagram of Green Haven is annexed to this Opinion.)

On May 15, Payant was scheduled to work the 1:00 to 9:00 p.m. shift, and reported to a line-up to receive her assignments. Her assignments that day were to patrol the A/B yard area, then to escort two companies of inmates from D block to the mess hall for dinner and back, lock those inmates in and conduct a count, and finally to report to the mess hall area at 6:00 p.m. Payant, along with officers Claude King and Barbara Hinson, after line-up went into the officers' mess, where she purchased a soft drink, then proceeded back to the westside corridor and headed

south toward their assignments. The telephone in the westside corridor rang and Officer Hinson answered it. The caller asked for Payant and Hinson called her to the telephone. Payant was on the telephone briefly and was overheard saying "what," "who," "yes," and "okay." After hanging up the telephone, Payant told King there was a problem she had to straighten out and that she would be right back, and she headed back down the westside corridor.

Payant passed both the westside control gate and the control station in the hospital corridor, heading east, at about 1:00 p.m. That direction would lead to the Chaplain's office complex at the other side of the hospital corridor—an area where defendant worked and had been seen that day.

Defendant was a clerk to the Catholic Chaplain. His duties included cleaning the Chaplain's office complex and emptying the garbage collected there. He also worked in Green Haven's package room where, once again, his duties included cleaning the area and transporting and dumping the garbage.

On May 15, 1981 the Catholic Chaplain was away from the institution on military leave. When defendant arrived for work there at 8:30 a.m. the officer in the hospital corridor, as he had done before, let him through the control gates and into the Chaplain's office. After returning to his cell for a count, defendant came back to the Chaplain's office, which was opened for him again at 12:30 p.m. Defendant was observed by corrections officers in the hospital corridor area near the Chaplain's office at or about 1:00 p.m., and around that same time another inmate (Teddy Goodman) saw defendant and Payant enter the Chaplain's office complex and walk down an enclosed corridor to the rear room, the Chaplain's library.

Although defendant elicited testimony from several corrections officers that they had, at various stages of the investigation, previously given statements that Payant was

seen elsewhere in the institution on May 15, 1981 after 1:00 p.m., none of the witnesses testifying at trial could recall with certainty seeing her alive after 1:00 p.m.

Some time after 1:00 p.m., an inmate knocked at the outer door to the Chaplain's office complex after hearing loud noises from inside. Defendant appeared from the rear office and, in a "nasty" manner, told the inmate to go away. That inmate later met a corrections officer in the hospital corridor, and the two of them proceeded back to the Chaplain's office to make phone calls. When no one answered their knock, they kicked the Chaplain's office outer door and it opened, a piece of cardboard falling out of the door. Once inside the complex, the corrections officer and another inmate who arrived shortly afterward noticed that the office was in disorder. The 55-gallon waste drum usually maintained in the outer alcove had been moved to the Chaplain's library, was about two-thirds full, and had boards placed over its top.

Defendant returned to the Chaplain's office with a plastic object under his arm, and went into the rear room. He told the corrections officer he had to empty some garbage, and left with the 55-gallon drum, returning some minutes later. Defendant was observed by officers in the hospital corridor and the gate corridor dumpster area transporting large waste drums on a cart. The officers did not check the drums, which one officer observed to be filled to about nine inches from the top. The corrections officer and the other inmate left the Chaplain's office about 2:45 p.m., while defendant remained inside the rear room. Shortly thereafter defendant appeared at the package room to empty the garbage, although defendant usually emptied the garbage there in the morning. This also was the first time the package room officer could remember that defendant brought the Chaplain's office waste cart with him. The last sighting of defendant that afternoon was near the A block foyer around 3:25 p.m.,

when he asked a corrections captain to return a cart to the administration corridor or accompany him while he did so.

Although Payant never showed up for her assignments on May 15, her absence was not reported until approximately 6:00 p.m. Subsequent telephone calls and searches by corrections officers failed to locate her. At about 8:00 p.m., the inmates were locked in their cells.

The state police were contacted, and that evening a state police bloodhound unit arrived. The bloodhound was given Payant's scent and began his trail at the westside corridor telephone where Payant received her call. On the first trail, the dog went from there up the westside corridor to D block, back down that corridor to A block, across the administration corridor, and up the eastside corridor. The dog paused and became visibly excited near an alcove in H block, then continued up the eastside corridor, out through the truck gates, back into the corridor, and up to the industry building, where he again became excited at an area on the second floor. The trail ended at the east side of the industry building. On the second and third trails, the dog took basically the same route, deviating only at one point to go into the A/B yard. After the dog completed his trails, he was led through the hospital corridor but exhibited no excitement, even though Payant unquestionably was in the hospital corridor on at least two occasions that day. The dog was not taken through the Chaplain's office.

The institution's dumpsters also were searched that evening. Two corrections officers climbed inside some of the dumpsters and tried to examine the refuse. One officer saw some plastic bags in the gate corridor dumpster, but could not get at them. In the early morning on May 16, the institution's garbage truck was brought in, and the dumpsters at industry, the gate corridor, the mess hall and the

administration corridor were emptied into the truck and compacted, while corrections officers shone their flashlights onto the garbage. The search failed to turn up Payant's body. Later that morning, Green Haven's civilian garbage truck operator, accompanied by two corrections officers, took the truckload of garbage to a dump in Amenia, where the garbage was spread out and examined with the aid of a bulldozer. At that time Payant's body was found encased in three plastic bags, her hands tied behind her back, her clothes in disarray and a cord tied around her neck. The location of the body led the truck operator to believe that it entered the truck via the industry or the first two gate corridor dumpsters.

Plastic bags and cord were present in the package room, and the cords in the venetian blinds of the Chaplain's office had recently been replaced by defendant and others. The plastic bags had been taped together by masking tape. Masking tape was kept in the Chaplain's office.

Payant's identification card and badge case were found in a utility closet near H block on May 18. An examination of those items yielded insufficient fingerprints for any identification. Hairs were found near the door to the rear room—the library—of the Catholic Chaplain's complex, and also in the closet of that room. Examination showed those hairs to be microscopically similar to samples of Payant's hair, but it was not possible to make a positive identification. In addition, hairs were found in the belt buckle area and in the bra on Payant's body. Those hairs were found to be microscopically similar to defendant's hair, although again a positive identification could not be made. Several stains in the Chaplain's office tested for blood were negative. Some scraping from the office did reveal blood, but there was not sufficient quantity to determine its source or age. Dusting of the office and the 55-gallon drum for fingerprints produced nothing. The

plastic bags, cord and tape found with the body of Donna Payant were also examined. While one plastic bag was similar to bags taken from Green Haven, the others were not. Although all eleven pieces of masking tape used on the bags were determined to be from the same roll, the ends of that tape could not be matched to the end of the roll of masking tape found in the Chaplain's office, which was of similar width. No fingerprints were found on the tape. The cord on the body did not match the cord removed from the Chaplain's office venetian blinds on May 27, 1981.

The first autopsy on Payant's body was performed during the evening of May 16, revealing multiple injuries both before and after death. The pre-mortem injuries included injuries to the face and head which could have rendered her unconscious instantly, injuries caused by the cord around her neck and hands, and certain injuries on her chest, including a curvilinear erosion on the upper right portion and amputation of both nipples. The post-mortem injuries were consistent with the compacting and bulldozing of the garbage. The pathologist testified that his findings were consistent with the theory of the murder posited by the People.

A second autopsy was performed on May 19, 1981 by a pathologist who also reviewed photos taken at the first autopsy. He concluded Payant had died of strangulation. Most of Payant's pre-mortem injuries were found to be internal, which would not produce much external bleeding, including trauma to the head that could have caused rapid loss of consciousness. The pathologist was of the opinion that the amputation of the nipples was caused by a human bite and that the mark on the upper right chest, which occurred shortly before death, could have been a human bite mark. For this reason, he contacted a forensic odontologist. Because of the perceived importance of the

wound on Payant's upper right chest, an expert photogrammetrist was employed to reproduce photographs of that area of her body in life-size. These and other materials subsequently were examined by several forensic odontologists retained by the People and by the defense.

The bite mark evidence was highly significant: if the curvilinear erosion on Payant's upper right chest was defendant's bite mark there was no innocent explanation for its presence there. The People produced four forensic odontologists (Drs. Homer Campbell, Arthur Goldman, Lowell Levine and Neil Riesner) who testified that the mark was a bite mark made by defendant. The prosecution's expert witnesses used two methods of identification. First, they compared a stone model of defendant's teeth, as well as impressions made in aluwax from the model, with the life-sized photograph of Payant's chest, identifying by visual observation individual characteristics of defendant's teeth such as shape of the arch and tooth shape, spacing and rotation, upon which their opinions were based. Second, the prosecution experts made photo-to-photo comparisons of the Payant mark and a bite mark known to have been made by defendant on human tissue four years earlier. The expert witnesses for the defense—three forensic odontologists (Drs. Haskel Askins, Lester Luntz and Irvin Sopher)—were of the opinion that the mark was not defendant's bite mark, and indeed was not a bite mark at all. Their opinions were in large part based on a different technique involving the production of transparencies, made from a model of appellant's teeth, which were laid over the photograph of the mark on Payant's body. Although the defense technique was portrayed as a controlled method by which the results could be objectively evaluated, in fact the experts acknowledged that steps in the production of the transparencies were subject to human variations and that, whichever technique

was used, there was no completely objective method of identifying a bite mark. The methods used all depended in part upon expert judgments to establish relationships between teeth and marks.

Finally, the People introduced the testimony of an inmate (Robert DiBona) who was housed in the same unit as defendant. That inmate testified that on May 16, 1982, approximately one year after Payant's death and after defendant had been charged with her murder, he and appellant were speaking when defendant, who seemed to be in a very emotional state, "blurted out * * * that he was being driven and he couldn't help himself, that he had to do what he had to do," and that "he shouldn't never have made the phone call, that he deserved to die." The inmate believed that the reference to the phone call related to defendant's case.

The theory posited by the defense both at trial and on appeal is that Payant was murdered as part of a conspiracy among unknown corrections officers, who lured her to the eastside corridor area of the institution by the telephone call, murdered her in the H block or industry area, and placed her body in the Green Haven dump truck while it was temporarily abandoned. This theory, which defendant concedes is "bizarre," takes Payant far from her assigned area, and means that both Payant's murder and the hiding and disposal of her body occurred in relatively open areas to which many people had access. This would have required a truly substantial conspiracy, which had no basis in the proof at trial.

The evidence linked defendant to the bite mark on Payant's body. The remaining circumstantial evidence established that defendant had both the opportunity, and access to the materials, for killing Payant and disposing of her body. We therefore conclude that the evidence was of such weight and credibility as to convince us that the jury was justified in finding defendant guilty beyond a reasonable doubt.

II

The various errors in the proceedings charged by defendant are without merit.

The Bite Mark Evidence

Defendant's major point in support of his request for a new trial concerns the admissibility of a photograph of a bite mark allegedly made by him in August 1977 on the nose of another victim, Marilee Wilson. In its presentation of the case the prosecution originally set out to identify the bite mark on Donna Payant's body by comparing a stone model of defendant's teeth to a photograph of the mark on Donna Payant's body. However, Dr. Campbell, a prosecution expert, testified on cross-examination that, for purposes of identifying bite marks, human skin was the ideal material in which to take bite mark impressions. The prosecutor argued that in light of that testimony the People should be permitted to introduce the Wilson photograph for comparison of a bite mark by defendant in human skin with the Payant photograph. The court thereafter conducted a hearing out of the jury's presence to determine (1) whether there existed an independent basis for concluding that defendant was responsible for the Wilson bite mark and (2) whether such a photographic comparison of bite marks was scientifically acceptable, and it held that a black and white photograph of the Wilson bite mark, redacted so as to show little more than the mark itself, could be admitted and a comparison made to the Payant photograph.

Defendant argues that the evidence should have been excluded for three reasons. *First,* he claims that his alleged confession to the Wilson homicide either was not made or was obtained in violation of his constitutional rights. If so, the only remaining evidence of his commission of the Wilson murder would have been the expert's comparison

of the stone cast of his teeth to the photo of the bite mark. Such evidence, defendant maintains, would suffer from the same flaw as comparison of the stone model of his teeth to Payant's photograph, and thus could not be admitted to corroborate that comparison. *Second,* defendant contends that the Wilson photograph was inadmissible because a photo-to-photo comparison is not a generally accepted scientific procedure for identifying bite marks. *Third,* defendant urges that even if the evidence were otherwise admissible, it should have been excluded because the danger of unfair prejudice outweighed its probative value.

At the hearing conducted to determine the admissibility of the Wilson bite mark photograph, State Police Investigator William Barnes testified that on August 22, 1977, he met with defendant and his attorney, Sanford Rosenblum, to administer a polygraph test regarding the Wilson homicide. Barnes said he brought defendant to the polygraph room, recited the *Miranda* warnings, and conducted a four and one-half hour interview during which defendant confessed to the Wilson homicide but then refused to take the polygraph test. Throughout the interview Rosenblum sat in an adjacent room where he could see but not hear the interview. Barnes denied agreeing with Rosenblum that any statement defendant made would not be used against him, nor did he ever hear of any such agreement. Rosenblum's testimony contradicted Barnes. Rosenblum said he arranged the polygraph examination but had an oral understanding with Barnes that defendant's statement would be limited to other charges arising out of a kidnapping and sexual assault on Mary Ann Maggio. Rosenblum testified he did not hear the *Miranda* rights administered, but could not hear the interview clearly because of static in the speaker system, and was told at the end of the interview that a polygraph test was not given because the length

of time Barnes spent with defendant would have rendered any result suspect.

Supported by a full explanation of its reasoning, the court found Barnes' testimony credible and ruled that the People had shown by independent evidence that defendant was responsible for the murder of Marilee Wilson as well as the bite mark found on her body.

Defendant now argues that even if the confession was made, it was obtained in violaton of his constitutional rights. Specifically, he claims that the interrogation violated the Sixth Amendment right to the presence of counsel, the Fifth Amendment privilege against self-incrimination which could only be waived knowingly and voluntarily, the State Constitutional prohibition of uncounseled waivers of the right to counsel, and the due process right to demand compliance with the terms of the agreement concerning the polygraph test.

Defendant's arguments assume that Rosenblum's testimony must be credited and Barnes' rejected. Having reviewed the testimony, we find no reason to disturb the conclusion of the trial court that Barnes was a credible witness. With the added benefit of having observed both witnesses as they testified, the trial court was justified in concluding that Rosenblum's testimony may have been affected by personal concern about possible claims of inadequate representation, and that the arrangement as related by Barnes may well have been thought to serve defendant's interests at that time in establishing an insanity defense (see *People v Smith,* 59 NY2d 156). Crediting Barnes' testimony, it is evident that defendant was deprived of no constitutional rights. Appellant waived his *Miranda* rights and no agreement was breached because of the questioning regarding the Marilee Wilson murder. Nor was there any violation of defendant's right to counsel under the New York State Constitution since defense counsel agreed

to the questioning outside of his immediate presence and placed no limit on the scope of the interview (cf *People v Beam*, 57 NY2d 241, 253-254; *People v Yut Wai Tom*, 53 NY2d 44). Thus, the trial court properly found that there was independent basis for concluding that defendant was responsible for the Wilson bite mark.

Similarly, there is no merit in defendant's second argument: that the technique of identificaton of the Payant bite mark by a photo-to-photo comparison with the Wilson bite mark was not shown to have requisite scientific acceptability.

The chief expert witness for the People, Dr. Levine,[2] testified that he could make a positive identification by comparing a photograph of a bite mark to a stone cast of teeth, but the best means for identifying a bite mark would be comparison with another bite mark made in skin in similar circumstances. According to Levine, photo comparison of different bite marks on the same victim is an accepted technique. Levine testified that, though there has been little occasion for comparison of bite marks on different persons, among forensic odontologists such a procedure was reliable and accepted, and he named seven odontologists (there are 45 to 50 in the nation) who have recognized it. Levine had himself used this technique previously and on one occasion testified in court on the procedure. For the defense, the principal expert witness, Dr. Luntz, testified that the comparison of a 1977 photograph of a bite mark on a nose with a 1981 photograph of a bite mark on a chest was not generally accepted as a reliable technique for identifying the biter. He noted differences in the elasticity of skin and in skin properties depending on the affected area of the body, and observed that skin is not a good medium for registering bite marks.

[2]The testimony of the remaining experts, both for the prosecution and for the defense, was substantially similar to that of Drs. Levine and Luntz, respectively.

Dr. Luntz testified that photographs create distortions, but acknowledged that he had relied on a photo-to-photo comparison for purposes of excluding a suspect as the biter.

The court overruled defendant's objection to the evidence, reasoning that the photographic comparison was admissible here, as buttressed by identification through additional, more conventional means, such as (1) the comparison of a 1977 stone cast of defendant's teeth with a photograph of the 1977 Wilson bite mark, (2) the comparison of the 1977 cast with a cast of defendant's teeth taken in 1981, and (3) the comparison of the Payant photograph with the 1981 stone cast of defendant's teeth.

In *People v Middleton* (54 NY2d 42), this court recognized that identification of the perpetrator of a crime through bite mark evidence had gained general acceptance in the scientific community. "The test is not whether a particular procedure is unanimously indorsed by the scientific community, but whether it is generally acceptable as reliable." *(Id.* at 49.) The techniques employed in *Middleton* (photography, freezing of tissue specimens, taking of dental molds, visual observation) were approved by the majority of experts in the field as well as by appellate courts and therefore were accepted as generally reliable without a hearing concerning the scientific principles involved.

The need for comparison of bite marks on different victims apparently arises infrequently, and there are no published standards governing the process. *Middleton* specifically mentioned the use of photographs as a generally reliable technique in bite mark identification. Moreover, this was not a situation, like Middleton, where techniques were accepted without a hearing. Extensive examination and cross-examination of the experts centered on methodology. The prosecution experts testified that the technique

was reliable and accepted by the scientific community. The defense experts acknowledged the reliability and acceptance of photographic comparisons for exclusion purposes, and there was testimony establishing the reliability of such comparisons for inclusion purposes when bites appear on different parts of the body of a single victim. Given the acceptability of photographs for comparisons of bites on a single victim and the other evidence, we conclude that the process here was not significantly different. Indeed, because of a similarity in both the substance on which the bite marks were imprinted and the circumstances surrounding infliction of the marks, a photographic comparison could have a reliability not present with other techniques. We therefore agree that no error was committed in permitting the photo-to-photo comparison.

Finally, the probative value of the Wilson photograph outweighed its potential for unfair prejudice and was therefore properly admitted.

Evidence of uncharged crimes, though inadmissible to establish criminal propensity, is admissible if offered for some other relevant purpose (*People v Allweiss,* 43 NY2d 40, 46). One recognized ground for admission is to prove the defendant's identity, so long as identity is not otherwise conclusively established (*People v Beam,* 57 NY2d 241, *supra; People v Condon,* 26 NY2d 139). "In final analysis the process is one of balancing in which both the degree of probativeness and the potential for prejudice of the proffered evidence must be weighed against each other" (*People v Ventimiglia,* 52 NY2d 350, 359-360, *supra*).

The redaction of the Wilson photograph was so complete that little more than a jagged line representing the teeth marks appears, and the parties were required, in the presence of the jury, to refer to the exhibit only as defendant's known bite mark in human tissue. Based on our own

examination of the photograph, we find it highly unlikely that the jury could have drawn any conclusions about defendant's past acts of violence. Similarly, while a juror might perhaps have speculated as to the origin of the bite mark, the redacted photograph as well as the innocuous description were fully consistent with noncriminality and certainly conveyed none of the circumstances surrounding Marilee Wilson's brutal murder. Thus, the danger of unfair prejudice, if not eliminated, was minimal.

In characterizing the probative value of the evidence as negligible, defendant claims that the identification of the bite mark on Donna Payant's body through a photographic comparison was cumulative (see *People v Ventimiglia*, 52 NY2d 350, 360, *supra; People v Blanchard*, 83 AD2d 905, 906). Prosecution experts did identify the mark on Payant's body by comparing it with models of defendant's teeth. But defense experts vigorously disputed this identification; moreover, testimony was elicited by the defense to the effect that human skin was an ideal medium for bite mark identification. In these circumstances, identifying the bite mark through another procedure cannot be dismissed as cumulative.

Defendant also argues that the comparison of the photographs was unnecessary because the prosecutor could have applied for a court order compelling defendant to bite into his own skin. Without determining that a court could have required defendant to bite himself with the force necessary to leave a mark like that present on Payant's body, no error was committed in not following that course. The mark left by defendant, who would have known both how this evidence was to be used and the precise method of infliction of the mark on Payant, could properly be regarded as not representative.

In light of the limitations placed on the prosecution's use of the Wilson photograph and the probative value in

comparing the unknown Payant mark to one known to have been made by defendant in human tissue, no error was committed by the admission of that evidence.

The DiBona Testimony

Defendant contends that reversal is appropriate because of a document discovered after trial which allegedly cast doubt on the testimony of the prosecution witness DiBona. DiBona testified that on May 16, 1982, during a recreation period, defendant made statements implicating himself in the murder of Donna Payant.

At some point in the prosecution, the defense submitted the following request for disclosure: "it would be appreciated if you would send to my attention Lemuel Smith's institutional record and the daily log book while Mr. Smith was housed in Cell Number 11." In response to this request the Special Prosecutor turned over excerpts from the SHU (Special Housing Unit) logbook, a detailed record of events such as meal periods, prisoner visits and inmate counts. The excerpts also reveal that several recreation periods were conducted throughout the day on May 16. Two of these periods are reflected in the following entries:

8:50 PC[3] back from rec.
8:55 PC to rec (6 inmates)
9:50 PC back from rec.

After trial, defendant himself obtained a "Chronological Report on Inmates Assigned to Special Housing Unit —Downstate Correctional Facility." This report covers defendant's activities over a 24-day period and contains one or more entries for each day. It records such events as church visits, court appointments, showers and the administration of medication. Though the report does not

[3] "PC," denoting "Protective Custody," refers to the inmates.

disclose when defendant went to recreation, it does indicate that he refused recreation ten times on nine different days during the 24-day period. The three entries for May 16 are:

9:30 AM Seen Father Licata
9:35 AM Med. from R. N.
2:20 PM Call out to visit #2 Sgt. R . . .

There is no indication that defendant refused recreation on May 16.

Defendant moved, pursuant to CPL 330.30, to set aside the verdict because of this "newly discovered evidence."[4] The report, according to defendant, demonstrated that he did not visit the recreation yard on May 16 and thus could not have made the statements to DiBona. In reply, the People claimed that there was no indication of a request for this document and, in any event, the report failed to demonstrate that DiBona and defendant were not in the recreation yard at the same time. The court denied the motion, finding the evidence "ambiguous and of only speculative value." On appeal, defendant contends that the prosecutor breached his duty to disclose exculpatory material.

The suppression of exculpatory evidence in the face of a specific and relevant defense request will seldom, if ever, be excusable (*United States v Agurs*, 427 US 97; *Brady v Maryland*, 373 US 83; *People v Cwikla*, 46 NY2d 434). However, where the defense makes only a general request, or none at all, the failure to turn over obviously exculpatory material violates due process only if the omitted evidence creates a reasonable doubt which did not otherwise exist. (*United States v Agurs*, 427 US 97, 112, *supra*.)

[4]In a noncapital case, "the power to review a discretionary order denying a motion to vacate judgment upon the ground of newly discovered evidence ceases at the Appellate Division." (*People v Crimmins*, 38 NY2d 407, 409.) Even in a capital case, this court has been most reluctant to substitute its discretion "to overturn the lower courts' exercise of discretion in denying a motion for a new trial upon the ground of newly discovered evidence." (*Id.* at 416.)

It would be inappropriate to apply the standard which obtains where the prosecutor had notice of exactly what the defense desired and suppressed it. Since the request did not put the prosecutor on notice that this specific document existed, he could have reasonably concluded that the disclosure of the SHU logbook satisfied the request. The record is devoid of any indication of prosecutorial bad faith or negligence. Thus, applying the *Agurs* standard, a new trial would be required only if the material were obviously exculpatory and created a reasonable doubt not otherwise existing.

The report satisfies neither requirement. Initially, it fails to establish that defendant did not participate in the recreation period between 8:55 a.m. and 9:50 a.m. because he could have been called out of recreation to meet with the priest. The discussion between DiBona and defendant could have occurred during one of the other recreation periods that day. Indeed, to the extent the report sheds any light on the question whether defendant went to the recreation yard on May 16, the report implies that he did, since—unlike the days when defendant refused recreation—there was no record of defendant's refusal to attend recreation on May 16. Accordingly, the trial court properly denied this branch of defendant's motion to vacate.

Additional Issues Supporting Request for New Trial

The Unusual Incident Report: Corrections Officer Eric Johnson, a defense witness, testified that he was assigned to F and G corridor during his 9:45 a.m. to 5:45 p.m. shift on May 15, 1981. Three days after the murder, on May 18, 1981, Johnson told police that on the day of the crime he observed Payant walking toward him shortly after 2:00 p.m. However, on September 18, 1981, he signed a statement indicating that this observation was made on the

same day he assisted an inmate in setting a digital watch, an event which occurred on May 8, 1981, a week before the murder. In the midst of the prosecutor's summation, the defense obtained from a third party a copy of an "unusual incident" report, containing the following notation, "2:08 [a.m., May 16, 1981] per conversation with Officer Johnson—he reported seeing Officer Payant in F and G corridor at approximately 1:30 p.m." Counsel moved for a mistrial, arguing that the jury would have been much less likely to accept Johnson's story about the mix-up in dates had it been aware that a mere 12 hours after the observation Johnson said he saw Payant on the 15th. Any error in the prosecutor's nondisclosure of this report was cured when the trial court interrupted the People's summation, allowed defense counsel to recall Johnson and place this evidence before the jury, and permitted him to address the jury on this issue before the prosecutor resumed his summation.

Recusal of the Trial Judge: Defendant next argues that the trial judge should have recused himself for three reasons: he appointed the prosecutor whose conduct with respect to the submission of evidence to the Grand Jury was being questioned; he had exhibited hostility toward defense counsel in denying several pretrial motions; and he had been associated with the Special District Attorney, when, as District Attorney of Dutchess County, he had hired the Special District Attorney as an Assistant District Attorney. These claims are unpersuasive. A trial judge's impartiality is not undermined merely by appointment of counsel for one of the adversaries. Nor did the court exhibit bias in ruling on defense motions. To the contrary, the record demonstrates that the court dealt with defense requests in an evenhanded manner. Finally, the decision on a recusal motion is generally a matter of personal conscience. While it may have been the better practice for the

court to insure that defense counsel was aware of its previous relationship with the Special District Attorney, the association was not so substantial that the court abused its discretion in presiding over the trial. (Compare *Corradino v Corradino*, 48 NY2d 894; see also *People ex rel. Stickle v Fay*, 14 NY2d 683.)

Delay in Appointing Counsel and Disparity in Funding: Defendant challenges as violating his right to counsel the delay in appointing his present counsel and the disparity in funding between the prosecution and the defense. Defendant's counsel first appeared for defendant on June 10, 1981, when appellant informed him that he lacked confidence in the Public Defender's office. Counsel declared in open court that he would serve without compensation. Some months later, however, he made the first of a series of legal moves to obtain compensation for his services. These requests were denied. In March 1982, defendant discharged counsel because of the funding impasse and the court appointed the Dutchess County Public Defender, who was unable to establish a meaningful attorney-client relationship with defendant. Finally, in September 1982, the court granted the Public Defender's motion to be relieved and defendant's counsel and his associate were appointed, with compensation at the established rates for defense counsel. Whatever other rights defense counsel may have to receive increased compensation, in order to prevail on this appeal defendant must show that his defense was ineffective as a result of the delay or disparate funding. Such a showing has not been made. Nor can the court presume that the alleged errors resulted in a denial of meaningful representation where our independent review of the record belies this conclusion.

Change of Venue: Prior to jury selection, defendant moved in the Appellate Division for a change of venue because of the great number of penal facilities in Dutchess

County, the substantial impact of their presence on the economy of the community, the atmosphere of hatred and fear, and the danger of racism. We find no error in the court's conclusion that the application should have awaited the results of *voir dire* (see *People v Culhane,* 33 NY2d 90; *People v Boudin,* 87 AD2d 133, 135). Since defendant failed to renew the motion following *voir dire,* there is no other ruling for this court to review (*People v Parker,* 60 NY2d 714).

Hypnosis Charge: Although several prosecution witnesses were hypnotized, the trial court determined that it would limit their testimony to events recalled prior to hypnosis, and defendant admits that the hypnosis issue was not a major factor before the jury. In *People v Hughes* (59 NY2d 523, 548), the court said that a trial court should instruct the jury that a hypnotized witness usually acquires a measure of confidence in events recalled under hypnosis—if the defendant requests such a charge. Defendant failed to ask for this instriction, and its absence from the charge does not warrant reversal in the interest of justice.

Further Cross-Examination of Goodman: The trial court did not abuse its discretion in prohibiting defense counsel from cross-examining Teddy Goodman more extensively about the details of his testimony at his own murder trial. (Goodman testified that on May 15, 1981, he saw defendant and Payant enter the Chaplain's office together.) Counsel had already mounted a substantial attack on Goodman's credibility and the limits placed on cross-examination regarding a collateral crime were not unreasonable (see Cohen & Karger, Powers of the New York Court of Appeals § 197, p 740).

III

Having found that the evidence was convincing beyond a reasonable doubt, and having discovered no error warranting a new trial, we turn to defendant's challenge to the constitutionality of New York's death penalty statute.

Defendant was convicted of murder in the first degree under section 125.27 of the Penal Law, which provides:

> A person is guilty of murder in the first degree when:
>
> 1. With intent to cause the death of another person, he causes the death of such person; and . . . at the time of the commission of the crime, the defendant was confined in a state correctional institution, or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life, or at the time of the commission of the crime, the defendant had escaped from such confinement or custody and had not yet been returned to such confinement or custody; and . . . [t]he defendant was more than eighteen years old at the time of the commission of the crime.

Upon a conviction of first degree murder, the court must impose a sentence of death (Penal Law, §60.06).

Defendant argues primarily that the statute's failure to allow the sentencer to consider any relevant mitigating circumstances violates the Eighth and Fourteenth Amendments' prohibition of the infliction of cruel and unusual

punishments.[5] To prevail on this claim, defendant must overcome the strong presumption of constitutionality which attaches to legislative enactments (*People v Davis*, 43 NY2d 17, 30, *supra*).

Mindful of the singular gravity of the death penalty, our legal system has struggled to accommodate the twin objectives of "a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." (*Eddings v Oklahoma*, 455 US 104, 110.) While not addressing the precise issue before us, over the past 12 years since *Furman v Georgia* (408 US 238), the Supreme Court in a line of decisions reviewing death penalty statutes has defined the criteria required to meet these objectives.

In *Furman*, the Court nullified a statute which gave the sentencer unguided discretion to decide whether to impose the death penalty. Although the five-Justice majority did not agree on a uniform rationale, the case is generally interpreted to prohibit the arbitrary and capricious imposition of the death penalty (see *Gregg v Georgia*, 428 US 153, 188, 195, 206). The Court provided further explanation of the constitutional requirements for death penalty statutes in a group of cases decided in 1976. Finding, substantively, that capital punishment was not a *per se*

[5]The People urge that defendant has no standing to attack the statute on this basis because he has not actually shown any mitigating circumstances, and the statute must be evaluated as applied to him. Where the statute is attacked because it affords no opportunity to show mitigating circumstances, a defendant can hardly be denied review for failure to show any. It would be nothing short of outrageous to put a defendant to death because his counsel failed to make an offer of proof of mitigating circumstances, when the statute did not permit the sentencer to consider any mitigating circumstances. Moreover, death penalty statutes have been reviewed without a specific showing by defendant that the constitutional defects actually prejudiced him. (See, *e.g.*, *Roberts v Louisiana* (428 US 325), *Woodson v North Carolina* (428 US 280), and *People v Davis* (43 NY2d 17, *supra*).)

violation of the Eighth Amendment, the Court examined the procedures used in imposing such a sentence. A three-Justice plurality concluded that the concerns of *Furman* could be satisfied "by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance" (*Gregg v Georgia*, 428 US 153, 195, *supra*), and the Court upheld the "guided discretion" statutes of three states (*Id.; Proffitt v Florida*, 428 US 242; *Jurek v Texas*, 428 US 262).

However, the Court struck down two death penalty statutes which provided for a mandatory death sentence upon conviction for specified crime (*Woodson v North Carolina*, 428 US 280; *Roberts (Stanislaus) v Louisiana*, 428 US 325). The *Woodson* plurality identified three independent deficiencies in a mandatory death penalty statute. *First*, in light of the near-universal rejection of mandatory death penalties prior to *Furman*, such a statute violated the "evolving standards of decency which mark the progress of a maturing society." (*Trop v Dulles*, 356 US 86, 101.) The reenactment of the death penalty by some states after *Furman* reflected attempts "to retain the death penalty in a form consistent with the Constitution, rather than a renewed societal acceptance of mandatory death sentencing" (*Woodson v North Carolina*, 428 US 280, 298, *supra*). *Second*, the mandatory death penalty failed to answer *Furman's* concern about unbridled sentencing discretion because jurors often vote to acquit despite sufficient evidence of guilt where the inevitable consequence of their guilty verdict is a death sentence. *Third*, a mandatory death sentence failed to allow for particularized consideration of relevant aspects of the defendant's character and record and the circumstances of the offense:

> While the prevailing practice of individualizing sentencing determinations generally reflects simply

> enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see *Trop v Dulles*, 356 U.S., at 100 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. *(Id.* at 304.)

Because death, "in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two * * * there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case *(id.* at 305)." This sharpened need in the case of each irreversible execution precludes treating all persons subject to such penalty as "a faceless, undifferentiated mass" *(id.* at 304).

Even where the death penalty statute was narrowly restricted to five defined categories of homicide, in *Roberts (Stanislaus)* the absence of meaningful opportunity for the sentencer to consider mitigating factors was considered a fatal infirmity:

> The diversity of circumstances presented in cases falling within the single category of killings during the commission of a specified felony, as well as the variety of possible offenders involved in such crimes, underscores the rigidity of Louisiana's enactment and its similarity to the North Carolina statute. Even the other more narrowly drawn categories of first-degree murder in the Louisiana law afford no meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender. *(Id.* at 333-334.)

Subsequent decision both in the Supreme Court and this court have invalidated mandatory death penalty statutes which do not permit consideration of mitigating circumstances, however heinous the crime. In *Roberts (Harry) v Louisiana* (431 US 633), the Supreme Court declared unconstitutional a statute which mandated a sentence of death upon a conviction for intentional murder of a police officer, stating that it was incorrect to assume that no mitigating circumstances could exist when the victim is a police officer. Among the circumstances which could be offered in mitigation were the offender's age and prior record, the influence of drugs, alcohol or extreme emotional disturbance, and "even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct" (*id.* at 637). "[I]t is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense." *(Id.)* Following *Roberts (Harry),* this court in *People v Davis* (43 NY2d 17, *supra*) invalidated that portion of New York's mandatory death penalty which applied to the intentional murder of a corrections officer "plainly and simply and without verbiage, because the New York statute 'does not allow consideration of particularized mitigating factors' for purposes of 'the capital sentencing decision as to the particular offender,' it is unconstitutional." *(Id.* at 33.)

In *Lockett v Ohio* (438 US 586), the Supreme Court reviewed an Ohio statute which limited the number of mitigating circumstances which could be considered. As the plurality wrote:

> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the

> sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments. *(Id.* at 605.)

A majority of the Supreme Court embraced this rule in *Eddings v Oklahoma* (455 US 104). Because the sentence of death was imposed without consideration of mitigating factors required by the Eighth and Fourteenth Amendments in capital cases, Eddings' conviction for murder of a police officer was set aside, and the case remanded for consideration of all relevant mitigating circumstances. "By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency." (455 US 104, 112, *supra.*)

Individualized consideration of the offender and the offense is simply a recognition that in every case there are invariably differences. In capital cases, where such consideration is constitutionally required, the purpose is to reduce the risk that the death penalty will be imposed in spite of factors about the person or the crime which call for a different penalty. The requirement is premised not on the fact that one class of crimes is more or less atrocious than another, or one category of defendants more or less sympathetic, but on the final, irrevocable quality of the death penalty. This same concern necessarily pervades every capital case. Thus, under the standards

established by the Supreme Court, any death penalty statute which did not provide for consideration by the sentencer of all relevant individual circumstances would be incompatible with the commands of the Eighth and Fourteenth Amendments.

But the issue on this appeal cannot be so readily resolved. The Supreme Court has repeatedly, without explication, stated that it was not deciding whether the Eighth Amendment forbids a mandatory death penalty for murder committed by a person serving a life term of imprisonment (*Lockett v Ohio*, 438 US 586, 604 n. 11, *supra; Roberts (Harry) v Louisiana*, 431 US 633, 637 n. 5, *supra; Roberts (Stanislaus) v Louisiana*, 428 US 325, 334 n. 9, *supra; Woodson v North Carolina*, 428 US 280, 287 n. 7 & 292 n. 25; *Gregg v Georgia*, 428 US 153, 186, *supra*).[6] This court also has expressly left the question open (*People v Davis*, 43 NY2d at 34 n. 3, *supra*).

In *Lockett*, the plurality hinted at a reason why such a departure from constitutional requirements could even be considered: "We express no opinion as to whether the need to deter certain kinds of homicide would justify a mandatory death sentence as, for example, when a prisoner—or escapee—under a life sentence is found guilty of murder" (438 US 586, 604 n. 11; see also *People v Davis*, 43 NY2d 17, 43 [Breitel, C.J., dissenting]).

If the Supreme Court indeed intended to limit its reservation to the conceivable need for deterring murder by a life-term inmate with no possibility of parole, who could not otherwise be punished, then the reservation is not even applicable to defendant. Although the sentences for defendant's prior crimes were consecutive, they were imposed under section 70.30 of the Penal Law as it existed before the 1978 amendment. Thus, when he committed the

[6]In the Supreme Court's most recent decision on the subject, *Eddings v Oklahoma* (455 US 104), the majority did not perpetuate the reservation as to life-time inmates.

present offense defendant was serving an indeterminate prison term with a minimum of 25 years and a maximum of life, and (according to defense counsel, undisputed by the People) had the prospect of parole in 2003, at the age of 63.

That, even in the case of life-term inmates, there may be penalties available to punish and thus deter further crime underscores the necessity, in fulfilling the twin objectives of our capital-sentencing system, for requiring individual consideration of the offense and the offender.[7] In New York, a life sentence is not the necessary equivalent of life imprisonment. Diverse crimes are classified as A-1 felonies and thus punishable by a minimum sentence of fifteen years and a *maximum term of life* (Penal Law, §70.00), including arson (Penal Law, § 150.20), kidnapping (Penal Law, § 135.25), drug offenses (Penal Law, §§ 220.21, 220.43), and persistent felony offenses (Penal Law, § 70.10; see also Penal Law, § 70.08). Life-term inmates thus include persons who have never before committed a violent act, and persons with a realistic prospect of parole. Even before reaching the invariable differences in the circumstances of the crime, it is obvious that life-term prisoners in this state are not "a faceless, undifferentiated mass." (*Woodson v North Carolina*, 428 US 280, 304, *supra.*) Given the Supreme Court's definition of the rationale underlying the requirement of individual consideration by the capital-sentencer, society has no less motivation to avoid irrevocable error in fixing the appropriate penalty for life-term inmates than other human beings.

[7]While the dissent notes that evaluating deterrence and alternate punishments is for the Legislature, not the courts, such considerations are hardly to be ignored by us in light of the Supreme Court's reference to deterrence as a basis for its persistent "lifer" reservation (see *Lockett v Ohio*, 438 US 586, 604 n. 11). In order to determine the proper application of that reservation, it is obviously necessary to consider the basis on which it rests.

Where the question is whether the death penalty is *per se* unconstitutional, one can argue capital punishment is necessary to deter a person under a sentence of life imprisonment from committing additional crimes because any other sentence would be merely cumulative. This concern evidently led the *Gregg* Court, in its discussion of whether the death penalty was *per se* unconstitutional, to note that other sanctions may be inadequate to deter lifers. Indeed, the Supreme Court's reservation regarding life prisoners had its genesis in this discussion in *Gregg v Georgia* (428 US 153, 186, *supra*), and logically pertains to evaulation of the death penalty *per se*. But the distinction is not similarly meaningful where a statute is attacked only because the imposition of the death penalty is mandatory.

Execution is never an inevitable consequence of a criminal act. In every case, including one where the death sentence is mandatory upon conviction, it is only the specter of execution which can serve as a general deterrent. In the process of investigation and adjudication, there are several points where the ultimate imposition of the death penalty may be precluded. Initially, the culprit rarely expects to get caught. Even if the defendant is apprehended, the Grand Jury may not indict for a capital offense, the District Attorney may consent to a guilty plea to a non-capital offense (CPL § 220.10), or the petit jury may return a verdict of not guilty. After conviction, an appellate court may reverse as to sentence or the Executive may commute the sentence. Thus, even where the death penalty is mandatory, its imposition, in the eyes of an individual about to commit a crime, can never be more than a possibility.

Because execution is not inevitable, a discretionary death penalty, which allows for the consideration of the character as well as the record of the individual offender and the circumstances of the particular offense, differs little in terms of deterrence from a mandatory death penalty

and does not in fact detract from the value of capital punishment as a deterrent. This conclusion is especially warranted upon the recognition that any defendant's status as a life-term inmate would constitute a powerful aggravating circumstance and undoubtedly increase the likelihood that the sentencer would find the death penalty appropriate under all the circumstances.

While the People suggest that retribution and the protection of prison guards and the prison population support a departure from constitutional command in the case of life-term inmates, these fail as bases for a principled distinction for the same reasons as relate to deterrence. Providing the sentencer with the option of imposing the death penalty is no less an expression of society's outrage, of its vital concern for the safety of prison guards and the prison population, and its resolve to punish maximally, than a mandatory death sentence. The sentencer merely is given the authority to impose a different penalty where, in a particular case, that would fulfill all of society's objectives. A mandatory death statute simply cannot be reconciled with the scrupulous care the legal system demands to insure that the death penalty fits the individual and the crime.

The People argue that New York's death penalty statute is so narrowly drawn as to include by definition a consideration of aggravating and mitigating circumstances—that the defendant's age, prior record of serious crimes and homicidal intent are all elements of first degree murder, and that the affirmative defense of extreme emotional disturbance is a built-in mitigating circumstance. Even if it were true, that the statute comprehended every mitigating circumstance a defendant might be able to

show,[8] this precise argument, urged also by the dissent, has already been rejected by this Court. In *People v Davis* (43 NY2d 17, 34, *supra*), we identified "the fundamental error" in built-in defenses: "defenses relate to guilt or innocence whereas a mitigating factor may be of no significance to a determination of criminal culpability * * * * The point is that what is urged in mitigation will often not rise to the level of defense." (See also *Roberts (Stanislaus) v Louisiana*, 428 US 325, 332, *supra.*)

In sum, New York's mandatory death penalty is constitutionally infirm as applied to this defendant because of its failure to provide for the consideration of individual circumstances, one of the three deficiencies of a mandatory death penalty articulated in the plurality opinion in *Woodson*.[9] In view of our conclusion that New York's

[8]For example, mental defect short of insanity (see e.g., *Lockett v Ohio*, 438 US 586, 612-613, *supra*), which is not specified in New York's statute, might be a mitigating circumstance. While the dissent takes comfort from the Supreme Court's approval in *Proffitt v Florida* (428 US 242), *supra*) of a death penalty statute which contained a limited list of mitigating factors, the Court later made clear that, in approving the Florida statute, "six members of this Court assumed * * * that the range of mitigating factors listed in the statute was not exclusive" (*Lockett v Ohio*, 438 US 586, 606, *supra*). Similarly, the Court's approval of the Texas statute in *Jurek v Texas*, 428 US 262, *supra*, rested on the conclusion of three Justices that the statute was broadly interpreted so as to permit the sentencer to consider whatever mitigating circumstances the defendant might be able to show. (*Lockett v Ohio*, 438 US 586, 607, *supra*).

[9]Our conclusion is consistent with the results reached by other courts. See *Shuman v Wolff*, 571 F. Supp 213, 217 (D Nev) (appeal pending) ("imposing mandatory capital punishment for the life term prisoner who intentionally kills is to consider but one aspect of the character and record of the individual while ignoring totally the circumstances of the crime for which he is being sentenced"); *State v Cline*, 121 RI 299 ("a death sentence imposed by a sentencer who is not statutorily authorized to consider mitigating factors is a nullity"); *Graham v Superior Court*, 98 Cal App 3d 880, 888 *supra* (a mandatory death penalty "is not sufficiently narrow to encompass a consideration of mitigating factors required for a finding of constitutionality").

statute contravenes the federal constitution, we do not reach the issue of the State Constitution's similar prohibition of cruel and unusual punishments (Art. I, §5), or defendant's additional arguments that a mandatory death penalty for life-term inmates suffers from the other two deficiences of a mandatory death statute identified in *Woodson*.

The Attorney General, relying primarily on *People v Bailey* (21 NY2d 588), argues in the alternative that the court should deem the death penalty statute to include a provision for consideration of mitigating circumstances and remit for a hearing. In *Bailey*, this court considered the validity of a statute which permitted the sentencing judge to impose an alternative indeterminate term of imprisonment upon sex offenders. Since additional findings were necessary before this alternative sentence could be imposed, a then-recent Supreme Court case (*Specht v Patterson*, 386 US 605) required a hearing. The court construed New York's statute in a manner as to uphold its constitutionality and read into the statute a requirement for a hearing. This reading was not inconsistent with the language of the statute. By contrast, section 60.06 of the Penal Law provides that "the court shall sentence the defendant to death" upon a first-degree murder conviction. The Attorney General's suggested interpretation is wholly at odds with the wording of the statute and would require us to rewrite the statute. This we cannot do. (See *State v Cline*, 121 RI 299, *supra; United States v Harper*, 729 F2d 1210).

Based on our review of the record, the People have established defendant's guilt of murder in the second degree (Penal Law, §125.25 [subd 1]). We therefore modify the judgment by vacating the sentence of death, reducing the conviction to murder in the second degree, and remitting this case to the Supreme Court, County of Dutchess for resentencing and, as so modified, the judgment should be affirmed.

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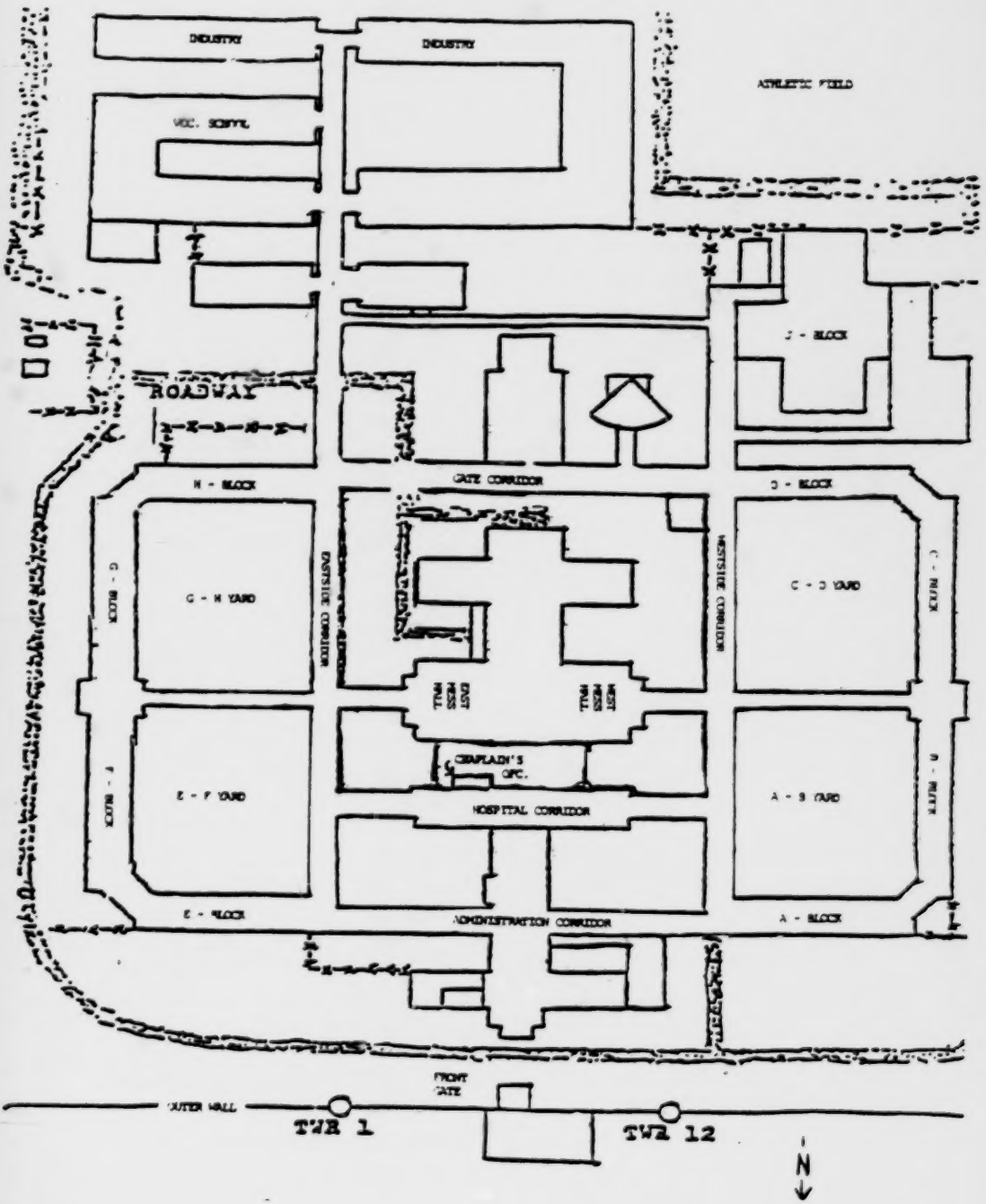

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SIMONS, J. (dissenting in part):

I concur in Parts I and II of the majority opinion which hold that defendant's guilt was established beyond a reasonable doubt in proceedings free of error. I dissent, however, from Part III of the majority opinion because defendant has failed to establish that subdivision 1, par a, cl (iii) of section 125.27 of the Penal Law defining first degree murder is unconstitutional. I would, therefore, affirm the judgment.

The legislative power of this state is vested in the Senate and the Assembly. Our task as judges is, quite simply, to determine whether the Legislature in exercising that power has violated the prohibition against "cruel and unusual punishments" found in the Eighth Amendment to the federal constitution, which is made applicable to the states through the Fourteenth Amendment (*Robinson v California,* 370 US 660). In doing so we are constrained by the strong presumption that the statute is constitutional and we may invalidate it only as a last resort (see *People v Davis,* 43 NY2d 17, 30; *People v Nieves,* 36 NY2d 396, 400; *Matter of Van Berkel v Power,* 16 NY2d 37, 40). The presumption arises because the Legislature has had the opportunity to investigate and study the need for the legislation and it has found circumstances warranting its enactment (*Hotel Dorset Co. v Trust for Cultural Resources of City of N.Y.,* 46 NY2d 358). Thus, a heavy burden rests on one attacking the statute to demonstrate that the legislators, as the elected representatives of the people, have exceeded their constitutional powers (see *Gregg v Georgia,* 428 US 153, 175; see, also, *People v Scott,* 26 NY2d 286, 291; *People v Pagnotta,* 25 NY2d 333, 337; *Matter of Van Berkel v Power, supra;* see *People v Whidden,* 51 NY2d 457, 462). Defendant has failed to do so.

It is now beyond question that, as a substantive matter, imposition of the death penalty does not violate the "cruel

and unusual punishments" provision of the Eighth Amendment. Although capital punishment is not unconstitutional *per se,* it may become so if imposed when the nature of the crime involved does not warrant capital punishment (*Enmund v Florida,* 458 US 1140 [felony murder]; *Coker v Georgia,* 433 US 584 [rape]; see, also, *Woodson v North Carolina,* 428 US 280, 286) or when the procedure by which it is imposed does not meet constitutional standards. Because capital punishment may be imposed for intentional murder, our inquiry is directed to the procedural aspects of the New York statute and whether they are constitutionally sufficient.

The general principle is that statutes permitting capital punishment must insure that it is not imposed "wantonly" or "freakishly" but in an objective, even-handed and substantially rational way (*Furman v Georgia,* 408 US 238, 309, reh den 409 US 902; see, also, *Gregg v Georgia,* 428 US 153 [plurality opinion], 188, *supra*). The statute must permit individualized determination to insure that the penalty fits not only the crime but also the criminal. The jury should consider the aggravating details of the crime (see e.g. *Lockett v Ohio,* 438 US 586; *Gregg v Georgia, supra; Proffitt v Florida,* 428 US 242; *Jurek v Texas,* 428 US 262) and also relevant factors mitigating the offender's punishment (see *Eddings v Oklahoma,* 455 US 104; *Lockett v Ohio, supra; Woodson v North Carolina,* 428 US 280, 303-305, *supra*). The rule to be derived from the cases is this: state legislatures have discretion to determine the scope of the sentences to be imposed for violation of their criminal statutes provided that (1) capital punishment is not imposed for a broad category of homicidal offenses, (2) individual consideration is given to the offender and (3) the statute, except in the rarest type of cases, permits the jury to consider any pertinent mitigating factors (see *Lockett v Ohio,* 438 US 586, 603-604, *supra; Woodson v North Carolina,* 428 US 280, 287, 304, *supra*).

These past decisions are of limited value, however, because this appeal presents one of those rare homicide cases which the Supreme Court has not addressed.[1] Indeed the Court's decisions have specifically excepted from their reasoning and holdings mandatory capital punishment for a murder committed by a prisoner or escapee serving a life sentence (see *Lockett v Ohio, supra,* p 604, n. 11; *Roberts [Harry] v Louisiana,* 431 US 633, 637, n. 5; *Roberts [Stanislaus] v Louisiana,* 428 US 325, 334, n. 9; *Woodson v North Carolina, supra,* p 287, n. 7 and p 292, n. 25; *Gregg v Georgia, supra,* p 187; but see *Eddings v Oklahoma, supra*). And so have we (see *People v Davis,* 43 NY2d 17, 34, n. 3). Thus, our task is to analyze section 125.27 bearing in mind that we are addressing an issue the Court has not yet passed upon involving a particularized crime committed by a singularly circumstanced individual.

New York's statute provides that a prisoner serving a sentence of life imprisonment or an indeterminate term of 15 or more years to life who intentionally causes the death of another person is guilty of first degree murder (Penal Law, §125.27, subd 1, par a, cl [iii]) and shall be sentenced to death (Penal Law, §60.06). A finding of guilt must rest on evidence which includes proof that the defendant was more than 18 years of age at the time of the crime (Penal Law, §125.27, subd 2). Thus, the statute meets the first two constitutional requirements because it covers only intentional homicide and it includes within the definition of the offense individualized consideration of the offender: he must be an adult who has previously committed a crime of sufficient magnitude to warrant a max-

[1]At oral argument counsel could recall no similar New York homicide and only one foreign case has been called to our attention (see *State v Cline,* 397 A2d 1309 [R.I.]).

imum sentence of life imprisonment.[2] Furthermore, although the statute mandates execution, it does not violate the third condition because it defines a rare type of crime and its definition meets precisely the standard suggested for such cases stated by the Supreme Court plurality in *Woodson v North Carolina* (422 US 280, 287, n. 7), "an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence, defined in large part by the character and record fo the offender." The Court has repeatedly stated that in such cases the jury need not be required to consider mitigating factors.

The Chief Judge would affirm on that ground alone, holding that the necessary import of the Supreme Court's statements indicates that the Legislature need not provide for consideration of mitigating factors concerning the defendant in this narrow category of homicide. That may indeed be so, but we need not decide the point for our statutory scheme contains several limiting or ameliorative factors which may be considered before capital punishment is imposed. This legislative determination that the statue should not be mandatory in an absolute sense certainly does not detract from its constitutionality and indeed supports the conclusion that the statute is constitutional. Thus, there may be no conviction for first degree murder if the defendant was acting under extreme emotional disturbance or was aiding another to commit suicide

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[2]These elements distinguish this subdivision of section 125.17 from the subdivision invalidated in *People v Davis* (43 NY2d 17, *supra*). The *Davis* decision actually involved two appeals, one from a conviction for killing a police officer, and the other for killing a correction officer. Defendant Davis' judgment of conviction was modified because of a failure of proof. In the companion *James* case, defendant was convicted of murdering a correction officer and sentenced to death. We declared the subdivision involved in that case unconstitutional because, unlike this subdivision, it failed to take into account the character of the offender (Penal Law, §125.27, subd 1, par a, cl [i]).

(Penal Law, §125.27, subd 2, pars [a], [b]), if his conduct was justified (Penal Law, art 35), if he acted under duress (Penal Law, §40.00), if he lacked capacity (Penal Law, §30.05), or if he was intoxicated at the time (Penal Law, §15.25). These statutory defenses are precisely the same circumstances, save two, as those suggested in mitigation by the Supreme Court in *Roberts [Harry] v Louisiana* (431 US 633, 636-637, *supra*), and recommended in the Model Penal Code (ALI Model Penal Code, §210.6 [Proposed Official Draft 1962] as cited in *Gregg v Georgia,* 428 US 153, 193-194, n. 44, *supra*). Indeed our statutory scheme makes explicit more ameliorative factors than did the statutes approved in *Proffitt v Florida* (428 US 242, 248, n. 6, *supra*) and *Jurek v Texas* (428 US 262, 271-273, *supra*). The two circumstances listed in the Model Penal Code and the *Roberts* decision which are not expressly included in our statute are a lack of prior criminal experience and accomplice liability. Neither applies here. Before a defendant may be subject to prosecution under section 125.27, he must have been convicted previously of a crime calling for imposition of a life sentence and he must murder while serving his sentence for that predicate crime. Thus, it is impossible for a person without any prior serious criminal involvement to be convicted of first degree murder under this subdivision. Indeed, this defendant had been twice previously convicted of murder and once of a rape-kidnapping. In each instance the sentencing judge had before him pre-sentence reports showing defendant's prior criminal, social and medical history (CPL 390.30, 390.40) and in each case the court sentenced defendant to the maximum term permitted by law. In addition, the record shows that defendant has acknowledged responsibility for three other homicides and a second rape. Prosecution was never started for one of those additional

murders and the prosecution of the other two was discontinued because conviction would serve no purpose: defendant's sentence could not be increased beyond the sentence he was already serving because under the former statute the minimum terms merged. Manifestly, defendant had an extensive and serious criminal record at the time of this, his sixth, homicide. Nor must accompliace liability be considered as a necessary mitigating factor and defendant does not claim that it should. Thus, unlike the North Carolina statute which authorized capital punishment for murder generally and which was invalidated in *Woodson* because it did not provide for consideration of any mitigating circumstances, New York's statute not only comes within the exception stated in *Woodson,* but it also provides several bases consonant with the rule stated in the Model Penal Code and other statutes approved by the Supreme Court cases on which the crime may be reduced to a non-capital offense. The New York Legislature has followed the general prescription of the Supreme Court's rules. It has made the permitted determination that because of the nature of this crime and the character of the offender, the mandatory death sentence may be imposed because of the singular nature of the offense. Extenuating circumstances are to be considered as defenses during the trial, not at a separate hearing. The Legislature's decision to leave the burden on the defendant to prove such circumstances as affirmative defenses, rather than to allow for their consideration as mitigating circumstances following a determination fo guilt, finds support in the singular nature of the crime and the character and record of the criminals to which the statute applies, and in the exemption contained in *People v Davis* (43 NY2d 17, *supra*) and the Supreme Court decisions of such crimes from the general rule.

It should also be noted that New York courts when instructing a jury must submit for the jury's consideration

any lesser included offenses (see CPL 300.50; *People v Glover,* 57 NY2d 61), and that a defendant in a capital case may appeal his conviction directly to this Court which then reviews both the law and facts and determines whether defendant's guilt has been established beyond a reasonable doubt (NY Const, art 6, §3, subd 6; CPL 450.70). These are important additional safeguards against the unbridled jury discretion and a verdict infected by caprice.

The majority contends that *Lockett v Ohio* (438 US 586, *supra*) controls this appeal. It sees no facts in the case significant enough to distinguish it from the accomplice liability involved in *Lockett* and although it notes that the court expressly reserved from that ruling a murder committed by one serving a life sentence, it holds that the reservation does not apply to this case because defendant was serving a statutory life sentence not a sentence for a term of his natural life (slip opn, p 31). No legal basis is given for that restrictive interpretation of the Court's language.

Relying upon *Lockett* (see, also, *Eddings v Oklahoma,* 455 US 104, *supra*), the majority fault the New York statute because it does not permit the jury to consider mitigating factors to insure that the punishment is appropriate to this defendant. In *Lockett* the defendant was sentenced to death for the felony murder of a pawn broker accidentally killed by her confederates during the course of a robbery. She was outside the shop at the time of the robbery with the get-away car and her guilt rested on accomplice liability. At the time of her conviction, the defendant was 21 years of age, of low normal intelligence and had never been in serious trouble with the law before. Psychologists rated her chances at rehabilitation as favorable. She challenged the Ohio sentencing statute because it did not permit the judge to consider her

character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime in mitigation of sentence. The Supreme Court, in a plurality opinion, declared the Ohio statute unconstitutional because it restricted the sentencer's consideration of mitigating factors (*Lockett v Ohio, supra,* 604). The *Lockett* holding has left in doubt prior decisions which appear to conflict with it (see e.g. *Proffitt v Florida*, 428 US 242, *supra*; *Jurek v Texas*, 428 US 262, *supra*). It should be obvious that it does not control this case because it is factually distinguishable from it and because the Supreme Court expressly reserved the application of that decision by stating that it did not pass on "whether the need to deter certain kinds of homicide would justify a mandatory death sentence as, for example, when a prisoner—or escapee—under a life sentence is found guilty of murder" (*Lockett v Ohio,* 438 US 586, 604, n. 11, *supra*). The Supreme Court has repeatedly included this exception in its decisions on capital punishment (see *supra*, p 3). We should not disregard it or strain to read more or less into the court's language to justify striking down this statute.

Nevertheless, the majority is persuaded by that decision that it was beyond the power of the Legislature to enact this statute requiring mandatory capital punishment because it suggests that retribution fails as a consideration in capital cases and because it finds that any deterrent effect of the statute in cases of less than life imprisonment is served by discretionary sentencing. The majority recognizes capital punishment is not unconstitutional *per se* because it may be the only deterrent to some crimes, but then, turning the reasoning around, it argues that mandatory capital punishment is not constitutional in this case because it is not the only deterrent available. It is not up to us, however, to reinvestigate the legislative determination that the death penalty is the only deterrent available for

murders committed by prisoners serving life sentences. Once the Legislature decides to enact a statute calling for capital punishment, its validity rests upon the procedural safeguards built into it. Thus, the Supreme Court stated in *Gregg* that it is for the Legislature to evaluate the deterrent and retributive value of the legislation:

> "The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.
>
> . . .
>
> In sum, we cannot say that the judgment of the Georgia legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular state the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.
>
> Finally, we must consider whether the punishment of death is disproportionate in relation to the crime for which it is imposed...[w]e are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes" (*Gregg v Georgia*, 428 US 153, 186-187, *supra*).

Notwithstanding this language, the majority now evaluates the retributive and deterrent values of capital punishment and finds the penalty mandated by the New York statute disproportionate to defendant's crime. I know of no other punishment which this Court has struck down as disproportionate (see *People v Broadie,* 37 NY2d 100, 111).

Briefly, and without accepting the majority's premise, it should be pointed out that the retributive value and deterrent effect of capital punishment are valid sentencing considerations which the Legislature was entitled to weigh and accept when enacting the statute (see *Furman v Georgia,* 408 US 238, 394-395, *supra; Roberts [Stanislaus] v Louisiana,* 428 US 325, 353-355, *supra* [White, J. dissenting]; *People v McConnell,* 49 NY2d 340, 346; *People v Suitte,* 90 AD2d 80, 83-85; see also, *People v Gittleson,* 18 NY2d 427, 432). Perhaps retribution when used in the sense of revenge is losing favor with the courts, as the majority contends, (see LaFave & Scott, Criminal Law, §5, p 24), but it is accepted theory that an offender should receive a deserved punishment according to the gravity of his offense as the community perceives it. In that sense, i.e., society's response to the crime, not to the criminal, retribution remains an important penological consideration. Indeed, retribution supplies some of the rationale for the current nationwide movement towards determinant sentencing—a fixed period of incarceration for offenses, lengthened or shortened minimally by consideration of a limited number of aggravating and mitigating factors (see Pugsley, Retributivism: A Just Basis for Criminal Sentences, 7 Hofstra L Rev 379). But critical to this appeal is the fact that retribution has nothing to do with the requirements of constitutional law and mandatory capital punishment may be imposed for purposes of retribution without violating constitutional precepts by recognizing

the serious nature of the crime and the individual characteristics of the defendant.

Similarly, the majority challenges the deterrent effect of the mandatory sentence because defendant may be punished otherwise for the commission of this homicide by loss of parole or by pardon. To repeat, deterrence is not an issue for the Court, the Legislature has made that policy decision and it is not charged with the burden of enacting a statute which invariably results in the least severe penalty having some deterrent effect (*Gregg v Georgia*, 428 US 153, 175, *supra*). But to the extent that the necessity of the statute as a deterrent may be considered to be before us, it should be noted that there are various forms of deterrence, specific deterrence to incapacitate the offender from repeating this or other crimes, and general deterrence, to deter others from committing similar crimes. The statute does serve the function of specific deterrence in this case. It prevents this defendant who has committed six murders and two rapes from killing again. The general deterrent effects of capital punishment on the population as a whole, in this case the prison population, is a subject on which reasonable minds can differ but it is significant that the majority of American jurisdictions after studying the matter and reviewing the available evidence on the subject have decided certain crimes warrant capital punishment. This record contains no evidence to establish otherwise. Because the available evidence is unpersuasive and because reasonable minds may differ about it, the subject is one appropriately left to the Legislature (see *Gregg v Georgia*, 428 US 153, 179, 186-187, *supra;* and see *People v Broadie*, 37 NY2d 100, 117, *supra*).

Several other grounds are urged for invalidating the statute.

The majority notes that homicide is not the only crime which may result in a life sentence in New York and that

the statute may apply to many whose predicate convictions are less egregious than are this defendant's. Insofar as that may be so, those cases are not before us. We are required to decide whether the statute is constitutional as applied to this defendant. He, of course, may argue that the statute is unduly restrictive as to him but whether it is unconstitutional when applied to others must await another day (see *New York v Ferber,* 458 US 747, 767; *Broadrick v Oklahoma,* 413 US 601, 610; *United States v Raines,* 362 US 17, 21; *People v Parker,* 41 NY2d 21, 24; *People v Drayton,* 39 NY2d 580; *People v Broadie,* 37 NY2d 100, 109, *supra*).

Next, the majority contends that mandatory capital punishment is wanton or arbitrary for a number of reasons: possible unevenness in the application and enforcement of the statute; the chance that the defendant may not be caught; the possibility of a plea bargain to a lesser charge or the possibility that the petit jury may refuse to convict (slip opn, pp 32-33). These arguments have been made and rejected before (see e.g. *Gregg v Georgia,* 428 US 153, 199, *supra; Proffitt v Florida,* 428 US 242, 254, *supra; Jurek v Texas,* 428 US 262, 274, *supra;* see, also, *Roberts [Stanislaus] v Louisiana,* 428 US 325, 348-349, *supra* [White J. dissenting]).

Finally, the majority urges that the trial should be bifurcated to permit the submission of mitigating circumstances at a sentencing hearing rather than requiring them to be asserted as defenses at trial. Mandatory sentences are not necessarily unconstitutional, however (see *Rummel v Estelle,* 445 US 263; *People v Broadie,* 37 NY2d 100, *supra; Matter of Dodd v Martin,* 248 NY2d 398-399; *People v Gowasky,* 244 NY 451, 466), and although bifurcation may be a desirable procedure, it is not required, even in cases less serious than this one, involving murderers who do not kill while serving a life sentence (see *Lockett v*

Ohio, 438 US 586, 605, *supra; Gregg v Georgia,* 428 US 153, 195, *supra;* see, also, *People v Davis,* 43 NY2d 17, 34-35, *supra*).

The disagreement in this Court, as in the Supreme Court (see e.g. *Lockett v Ohio,* 438 US 586, 628-636 [Rehnquist, J. dissenting], *supra; Roberts [Stanislaus] v Louisiana,* 428 US 325, 356-358 [White, J. dissenting], *supra*), is the extent to which mitigating factors must be considered by the court or jury before capital punishment may be imposed. The majority hold that mandatory sentencing is not constitutionally permissible even in a case involving a murder by a prisoner serving a life sentence, that there must be a discretionary procedure which leaves the sentencer free to consider all factors mitigating defendant's crime. The Supreme Court has not adopted that rule. Indeed, the Court has scarcely been able to gather a majority for the rule that the sentencer must consider any relevant mitigating factors in cases involving persons not serving a life sentence who are convicted of murder. It did so only once, in a division of the Court that spoke more to the kinetics of the collegial decision-making process than certainty in the law (see *Eddings v Oklahoma,* 455 US 104, *supra*). Surely, considering this state of the law defendant has not carried his burden of proving that the statute is unconstitutional and this Court should not declare it so.

There is a great temptation for judges to tinker with statutes to satisfy their own likes. Many, if given the opportunity to do so, might abolish capital punishment altogether or create a different sentencing procedure. But respect for fundamental rules of separation of powers, our positions as appointed judges and the legislators' roles as the elected representatives of the people, requires that we accept the legislative will. We must take the statute as we find it and interpret it according to existing constitutional standards. This statute meets those standards, at least

defendant has not met his burden of establishing otherwise, and we should not "substitute [our] judgment for that of the Legislature as to wisdom and expediency of the legislation" (*People v Davis,* 43 NY2d 17, 30, *supra*).

COOKE, Ch. J. (dissenting in part):

I respectfully dissent in part.

I would affirm the judgment of conviction and sentence imposed. There is no disagreement with the proposition that defendant's guilt was established beyond a reasonable doubt in a trial free of reversible error. I cannot agree, however, that section 125.27 (subd. 1, par [a], cl [iii]) of the Penal Law is unconstitutional.

As recognized in the other writings, we must approach the constitutional issue with an acceptance that the State statute in question carries with it a strong presumption of constitutionality, that it should be stricken as unconstitutional only as a last resort, and that courts may not substitute their judgment for that of the Legislature as to the wisdom and expediency of the legislation (*People v Davis,* 43 NY2d 17, 30, cert den 435 US 998). Furthermore, the question of constitutionality is a legal issue separate and apart from the topic of whether the statute, granted it is constitutional, is wise or advisable, which is a legislative responsibility (*id.*, p 23).

Section 60.06 of the Penal Law provides that "[w]hen a person is convicted of murder in the first degree as defined in section 125.27, the court shall sentence the defendant to death." The relevant components of the first-degree-murder statute (Penal Law, §125.27) provide: "A person is guilty of murder in the first degree when: 1. With intent to cause the death of another person, he causes the death of such person; and (a) * * * (iii) at the time of the commission of the crime, the defendant was confined in a state

correctional institution * * * upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life * * *; and (b) [t]he defendant was more than eighteen years old at the time of the commission of the crime." Certain affirmative defenses, further limiting the scope of the category for conviction of first-degree murder, are listed in subdivision 2 of the section.

It is clear that a majority of the Supreme Court now hold that, generally, a death penalty statute, to be constitutional, must permit consideration of, *"as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" (*Eddings v Oklahoma,* 455 US 104, 110; *Lockett v Ohio,* 438 US 586, 604).

There is a legitimate exception to this general rule, which is embodied in the New York statute. As set forth by Judge Simons, the Supreme Court plurality in *Woodson v North Carolina* (428 US 280) referred to "an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence, defined in large part in terms of the character or record of the offender" (p 287, n 7). Although the death sentences imposed there were set aside, the plurality was careful to point out that no opinion was expressed regarding the constitutionality of a mandatory death penalty statute limited to such a narrow category of homicide (*id.).* Such a reservation was also noted in *Lockett v Ohio* (438 US 586, 604, n 11 [1978], *supra*), and in *Roberts (Harry) v Louisiana* (431 US 633, 637, n 5 [1977]). In *Roberts (Stanislaus) v Louisiana* (428 US 325 [1976]), the plurality observed that "a prisoner serving a life sentence presents a unique problem that may justify such a law" (p 334, n 9; see, also, *Woodson v North Carolina,* 428 US 280, 295, n 25 [1976], *supra;*

Gregg v Georgia, 428 US 153, 186 [1976]; and *People v Davis,* 43 NY2d 17, 34, n 3, and at p 43 [Breitel, Ch J., dissenting], *supra*).

Capital punishment is an extreme sanction. As Judge Simons notes, it has been declared as "suitable to the most extreme of crimes" (see *Gregg v Georgia,* 428 US 153, 187, *supra*). "The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests" with the Legislature, which can evaluate the results of statistical studies in terms of conditions prevalent in the State and with a flexibility of approach that is not available to the courts (*id.,* at p 186). The further presumption, that the Legislature has investigated for and found facts necessary to support the legislation (*I.L.F.Y. Co. v Temporary State Housing Rent Comm.,* 10 NY2d 263, 269), should not be disregarded. Courts should not substitute their social beliefs and values for those of the Legislature (*Ferguson v Skrupa,* 372 US 726, 730). There should be and need be no such substitution here.

It cannot be said that there is no rationale to justify the Legislature's imposition of the extreme sanction where a defendant intended to cause the death of a person and did cause the death of that person, where at the time of commission defendant was over 18 years of age, and where he or she was confined in a state correctional institution serving a sentence for an indeterminate term the minimum of which was at least 15 years and the maximum of which was life (Penal Law, § 125.27[1][a][iii]).* The need for discipline in our State correctional institutions is urgent and obvious. The legislative prerogative and prescription

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*As noted in the majority writing, defendant had been sentenced to three consecutive sentences of 25 years to life, once for kidnapping and twice for murder (see *People v Smith,* 59 NY2d 156, 160, 162, 163) imposed under former section 70.30 of the Penal Law. These sentences merged into a single 25-year-to-life term.

of a deterrent limited to this "narrow category" in question, as further circumscribed by the statutory defenses, is compatible with the absolute necessity for order in state correctional institutions. At least, the Legislature could so find.

Although I arrive at the same result, I do not join in the dissent of Judge Simons, however, because one of its bases takes root in the affirmative defenses recited in the Penal Law. These are defenses, not mitigating circumstances. This court has already pointed out the difference: such defenses "relate to guilt or innocence whereas a mitigating factor may be of no significance to a determination of criminal culpability," and "statutory defenses alone do not take the place of a distinct consideration of mitigating factors" (*People v Davis,* 43 NY2d 17, 34, *supra*). "[W]hile there may be some visual or empirical satisfaction derived from counting and generally comparing the New York defenses with the mitigating factors indorsed by the Supreme Court, the fact is that these defenses do not require consideration of the character and record of the individual in respect to his sentence or punishment * * * New York's law does not permit a jury which has rejected these defenses and has found a defendant guilty of murder in the first degree to then mitigate the punishment by resurrecting the defenses" (*id.,* at pp 35, 36). For affirmance, we cannot rely on a statutory provision for mitigating circumstances, because there is none, and so, in that respect, the statute does not comply with the general rule enunciated by the Supreme Court (see *Eddings v Oklahoma,* 455 US 104, 110, *supra; Lockett v Ohio,* 438 US 586, 604, *supra*). This case, however, falls under an exception to that general rule as provided in the specified New York statute.

Judgment modified and case remitted to Supreme Court, Dutchess County, for resentencing in accordance with the opinion herein and, as so modified, affirmed. Opinion by Judge Kaye in which Judges Jones, Wachtler and Meyer concur. Judge Simons dissents in part and votes to affirm in an opinion in which Judge Jasen concurs, and Chief Judge Cooke dissents in part and votes to affirm in a separate dissenting opinion.

Decided July 2, 1984

APPENDIX 2.

Judgment or Decree Sought to be Reviewed.

Remittitur

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding.

SupC No. 235

THE PEOPLE & c.,

Respondent,

v.

LEMUEL SMITH,

Appellant.

The appellant in the above entitled appeal appeared by William M. Kunstler, Esq.; Mark B. Gombiner, Esq. and C. Vernon Mason, Esq.; the respondent appeared by William E. Stanton, Esq. and Hon. Robert Abrams, Attorney General.

The Court, after due deliberation, orders and adjudges that the judgment is modified and case remitted to Supreme Court, Dutchess County, for resentencing in accordance with the opinion herein and, as so modified, affirmed. Opinion by Judge Kaye in which Judges Jones,

Wachtler and Meyer concur. Judge Simons dissents in part and votes to affirm in an opinion in which Judge Jasen concurs, and Chief Judge Cooke dissents in part and votes to affirm in a separate dissenting opinion.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Dutchess County,

there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

DONALD M. SHERAW
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, July 2, 1984.

APPENDIX 3.

Order of the Court Below Permitting the Attorney General to Intervene as a Party.

STATE OF NEW YORK,

COURT OF APPEALS.

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twentieth day of March A.D. 1984.

Present,

Hon. Lawrence H. Cooke, Chief Judge, presiding.

Mo. No. 274

THE PEOPLE & C.,

Respondent,

vs.

LEMUEL SMITH,

Appellant.

A motion having heretofore been made upon the part of the Attorney General pursuant to Executive Law §71 to

file a brief and to participate in the oral argument of the appeal herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the brief to be filed on or before March 26, 1984.

DONALD M. SHERAW
Clerk of the Court

APPENDIX 4.

Constitutional and Statutory Provisions.

N.Y. Constitution.

§ 3. [Jurisdiction of court of appeals]

a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section;

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

* * *

§ 5. [Power of appellate courts upon appeal from judgment or order; transfer of appeals taken to improper appellate court]

a. Upon an appeal from a judgment or an order, any appellate court to which the appeal is taken which is authorized to review such judgment or order may reverse or affirm, wholly or in part, or may modify the judgment or order appealed from, and each interlocutory judgment

or intermediate or other order which it is authorized to review, and as to any or all of the parties. It shall thereupon render judgment of affirmance, judgment of reversal and final judgment upon the right of any or all of the parties, or judgment of modification thereon according to law, except where it may be necessary or proper to grant a new trial or hearing, when it may grant a new trial or hearing.

b. If any appeal is taken to an appellate court which is not authorized to review such judgment or order, the court shall transfer the appeal to an appellate court which is authorized to review such judgment or order.

N.Y. STATUTORY PROVISIONS.

N.Y. Criminal Procedure Law.

§ 450.70 Appeal by defendant directly to court of appeals; in what cases authorized.

An appeal directly to the court of appeals may be taken as of right by the defendant from the following judgment and orders of a superior court:

1. A judgment including a sentence of death;

2. An order denying a motion, made pursuant to section 440.10, to vacate a judgment including a sentence of death;

3. An order denying a motion, made pursuant to section 440.20, to set aside a sentence of death.

Executive Law.

§ 60. Department of law.

There shall continue to be in the state government a department of law. The head of the department of law shall shall be the attorney-general who shall receive an annual salary of eighty-five thousand dollars.

Executive Law.

§ 71. Attorney-general to appear in cases involving the constitutionality of an act of the legislature.

Whenever the constitutionality of a statute is brought into question upon the trial or hearing of any action or proceeding, civil or criminal, in any court of record of original or appellate jurisdiction, the court or justice before whom such action or proceeding is pending, may make an order, directing the party desiring to raise such question, to serve notice thereof on the attorney-general and that the attorney-general be permitted to appear at any such trial or hearing in support of the constitutionality of such statute. The court or justice before whom any such action or proceeding is pending may also make such order upon the application of any party thereto, and the court shall make such order in any such action or proceeding upon motion of the attorney-general. When such order has been made in any manner herein mentioned it shall be the duty of the attorney-general to appear in such action or proceeding in support of the constitutionality of such statute.

Office-Supreme Court, U.S.
FILED
OCT 29 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-355

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

– against –

LEMUEL SMITH,

Respondent.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-355

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

-against-

LEMUEL SMITH,

Respondent.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Question Presented

Do the Eighth and Fourteenth Amendments require that a defendant be given the right to present relevant mitigating factors before a sentence of death may be imposed?

Opinions Below

The opinion of the Court of Appeals for the State of New York is reported at 63 N.Y. 2d 41 (1984).

Statement of the Case

Respondent was indicted on October 6, 1981 under N.Y. Penal Law §125.27(1)(a)(iii). By motion dated November 25, 1981, Respondent moved to dismiss the indictment, alleging that N.Y. Penal Law §125.27(1)(a)(iii) violated, inter alia, the Eighth and Fourteenth Amendments to the Constitution of the United States. By order and opinion dated December 11, 1981, the trial court denied the motion.

Respondent was convicted on April 21, 1983, and sentenced to death, pursuant to N.Y.Penal Law §§ §60.06 and 125.27(1)(a)(iii), on June 10, 1983.

On July 2, 1984, the New York Court of Appeals affirmed Respondent's

conviction, but declared unconstitutional N.Y. Penal Law §§60.06 and 125.27(1)(a)(iii), on the ground that they did not permit consideration of individualized mitigating and aggravating factors. The Court of Appeals remanded the case to the trial court for resentencing. Respondent has not yet been resentenced.

Summary of the Argument

The Court should not exercise its certiorari jurisdiction to review the constitutionality of this mandatory death penalty statute. No state or federal jurisdiction currently has a mandatory death penalty statute. Since Furman v. Georgia, 408 U.S. 238 (1972), every state with a mandatory death penalty has either legislatively or judicially repealed its statute.

Even if a mandatory death penalty law was constitutionally permissible for life-sentenced inmates who commit murder,

the statute under review is too broad to pass constitutional muster. Because Penal Law §125.27(1)(a)(iii) applies to a wide variety of inmates, many of whom are serving terms with a minimum as short as fifteen years, it unconstitutionally treats a disparate group of offenders as an undifferentiated mass.

Certiorari is also inappropriate because petitioner tacitly concedes the unconstitutionality of the statute. Petitioner relies on the specific criminal history of respondent to argue for the death penalty. By conducting a "paper" mitigation-aggravation hearing, petitioner demonstrates the need for a death sentencing procedure which is keyed to the individual defendant and which offers an opportunity to rebut the allegations against him and present mitigating factors on his own behalf.

ARGUMENT

I. THE CONSTITUTIONALITY OF NEW YORK PENAL LAW §125.27(1)(a)(iii) DOES NOT PRESENT A QUESTION ON WHICH STATE OR FEDERAL COURTS HAVE DIFFERED, NOR DOES IT PRESENT AN IMPORTANT, UNRESOLVED ISSUE OF FEDERAL LAW.

This Court has traditionally reserved the exercise of its certiorari jurisdiction to resolve only those questions which have divided state high courts and federal courts of appeals, created conflicts between state high courts and federal courts of appeals, or which present important issues of federal law which should be resolved by it. Rule 17, Sup. Ct. R. (Rev. ed. 1980). The constitutionality of N.Y. Penal Law §125.27(1)(a)(iii) does not fall within any of these guidelines.

No state or federal jurisdiction currently has a mandatory death penalty statute. Most jurisdictions abandoned mandatory death penalty laws by the early

part of this century. Although ten states enacted such statutes following Furman v. Georgia, 408 U.S. 238 (1972), under the erroneous assumption that Furman required a mandatory statute, seven of these statutes were subsequently amended by state legislatures to provide for "guided discretion" death penalty schemes, see Ala. Code §13-11-2(a) (1975) (repealed)(discretionary statute at Ala. Code §13A-5-39-57 (West Cum. Supp. 1983); Ind. Ann. Stat. §10-3401(6)(iv)(Supp. 1973)(discretionary statute at Ind. Code Ann. §§35-50-2-3, -9 (Burns, 1979); La. Rev. Stat. Ann. §14:30(3)(West, 1974)(discretionary statute at La. Rev. Stat. Ann. §14:30 (West Cum. Supp. 1980); Nev. Rev. Stat. §300.030(I)(b)(1973)(discretionary statute at Nev. Rev. Stat. §§200.030, .033, .035 (1980); Okla. Stat. Ann. tit. 21, §701.1(7)(West Supp. 1973)(repealed)

(discretionary statute at Okla. Stat. Ann. tit. 21, §§701.7, 701.9-.15 (West Supp. 1980-1981); Va. Code §§18.2-10, -31(c), 19.2-264.2 to .4 (Cum. Supp. 1980), one was judicially amended to survive as a guided discretion statute, Jackson v. State, 337 So.2d 1242, 1253-57 (Miss. 1976), and two were declared unconstitutional by state high courts, People v. Smith, 63 N.Y. 2d 41 (1984); State v. Cline, __R.I.__, 397 A.2d 1309 (1979). This Court has never upheld a mandatory death penalty statute. The history of mandatory statutes, across the Nation and in New York State, indicates a decisive rejection of such laws. There is no need for this Court to use its certiorari jurisdiction to resolve a question that has been decided in the same way in every available forum.

A. Prior To Furman, The Nation Had Rejected Mandatory Death Penalty Statutes.

In Woodson v. North Carolina, 428 U.S. 280 (1976), this Court traced the history of the mandatory death penalty, noting that, at the time the Eighth Amendment was adopted in 1791, the Nation retained its common-law heritage and prescribed death as the only penalty for a broad range of offenses. See, e.g., H. Bedau, The Death Penalty in America, 5-6, 15, 27-121 (1967); R. Bye, Capital Punishment in the United States, 1-3 (1919). Dissatisfaction with this remnant of a redoubtable colonial legacy soon prompted state legislatures to limit the type of offenses for which the penalty would be imposed. Bedau, supra, at 23-24; Bye, supra, at 5; Knowlton, Problems of Jury Discretion in Capital Cases, 101 U. Penn. L. Rev. 1099, 1102 (1953). This reform prompted yet further "narrowing" until, by

the early 18th century, the mandatory death penalty was authorized only for certain types of homicide. Woodson, 428 U.S. at 290-292.

Even these reforms, however, resulted in frequent jury nullification. Many plainly guilty offenders were acquitted because the jury did not wish to impose the penalty of death. Bedeau, supra at 27. Tennessee became the first state to address this problem by adopting a statute permitting jury discretion as to sentence. Tenn. Laws. 1837-1838, c. 29. By 1900, 25 states and the federal government had abandoned the mandatory death penalty in favor of discretionary statutes. Woodson, 428 U.S. at 291. Fourteen more states followed suit in the next two decades. By 1963, no jurisdiction in the country retained the mandatory death penalty generally for the crime of murder. Woodson, 428 U.S. at 291-92. No state,

prior to Furman, ever returned to a mandatory death penalty after adopting a discretionary statute. Woodson, 420 U.S. at 295 n. 30.

This widespread rejection was not limited to general mandatory death penalty statutes. Even mandatory death sentences for murders by life-term prisoners had become relics. Only five states (New York not among them), had such statutes by 1964.

B. The Confusion Over Furman And The Return of Mandatory Statutes

In Furman v. Georgia, 408 U.S. 238 (1972), this Court reversed several death sentences, but the majority failed to agree on a rationale. Each member of the Court produced a separate opinion. "Predictably, the variety of opinions supporting the judgment in Furman engendered confusion as to what was required in order to impose the death penalty in

accord with the Eighth Amendment." Lockett v. Ohio, 438 U.S. 586, 599 (plurality opinion). It was widely, if erroneously, believed that Furman required the elimination of any discretion in the imposition of capital punishment.

After Furman, ten states, including New York, enacted mandatory statutes. This was an unprecedented reversal of a previously inexorable historical trend away from such laws. Woodson, 428 U.S. at 295 n. 30. However, as this Court has observed, the new statutes did not "evince a sudden reversal of societal values regarding the imposition of capital punishment." They "reflect[ed] attempts by the States to retain the death penalty in a form consistent with the Constitution, rather than a renewed societal acceptance of mandatory death sentencing."

Id. at 298.[1] In the years following Woodson, Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977), and Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976), all ten post-Furman mandatory statutes were abandoned. Significantly, all of these statutes were changed by the states themselves, without federal action.

C. The History Of New York's Mandatory Death Penalty Mirrors The National Trend.

Contrary to the assertions of Petitioner, Petition for Certiorari at 14, 26

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1 E.g., Note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 Harv. L. Rev. 1690, 1712 (1974) (concluding that "mandatory statutes seem to fulfill Furman's requirement that discretion in the sentencing process can be cabined."); People v. Fitzpatrick, 32 N.Y. 2d 499, 513 (1973) (striking down New York's 1967 death penalty legislation because "the Legislature, instead of providing mandatory death sentences for all defendants who kill police officers, has vested juries with a discretion to decide, case by case, whether that ultimate punishment should be inflicted.")

and n.16, New York state has not made any legislative determination that a mandatory death penalty is the best way to safeguard prison staff and inmates. The history of New York's death penalty law demonstrates a pre-Furman rejection of mandatory statutes, a brief revival after Furman, and then a total rejection following the Woodson and Roberts cases.

New York abandoned all mandatory death sentences in 1963. L. 1973, c. 994, §§1-2. The 1963 law retained the death penalty as an available punishment for all premeditated murders, but allowed the sentencer to determine when it should be invoked. The sentencer was permitted to consider "any matter relevant to the sentence, including but not limited to, the nature and circumstances of the crime, defendant's background and history, and any. . . mitigating circumstances. N.Y.

Penal Law §1045-a(13)(McKinney's Supp. 1965).[2]

The death penalty statute was again amended in 1967, so that its application was limited to murders of police officers or by life-term prisoners. L. 1967, c. 791. Even in those limited circumstances, however, it was still imposed on a discretionary basis. N.Y. Penal Law §§25.30, 125.35 (McKinney, 1967).

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[2]The legislative history of the 1963 amendment makes clear that New York had come to agree, albeit belatedly, that mandatory death sentences do not serve society's best interests. The supporting memorandum of the bill's sponsor, the Temporary State Commission on Revision of the Penal Law and Criminal Code, noted two primary benefits offered by the amendment. First, the "bill would achieve what is believed to be a most worthy objective, namely, that of terminating New York's solitary adherence to the mandatory death penalty for murder." Second, by expanding the scope of the sentencing hearing as widely as possible, the bill would provide for a "fairer and more enlightened medium for decision of this issue." 1963 McKinney's Session Laws of New York, 2018-20.

On the basis of this Court's decision in Furman, the New York Court of Appeals struck down the 1967 death penalty law in People v. Fitzpatrick, 32 N.Y. 2d 499, cert. denied, 414 U.S. 1033 (1973). Two weeks later, then Governor Rockefeller, who had brought about and praised the elimination of mandatory statutes just six years earlier, announced:

> I am deeply concerneed that the deterrent provided by the death penalty for the murder of peace officers. . . has been undermined by [Fitzpatrick]. In the interests of deterring such crimes, it is vital that the death penalty be retained in such cases. [Fitzpatrick and Furman hold] that the discretion permitted under State law as to application of the death penalty rendered it a cruel and unusual punishment. . . If. . . the Supreme Court upholds the State Court [decision in Fitzpatrick], I plan to offer legislation at the next session of the Legislature which would eliminate the discretionary nature of the death penalty and thus restore the penalty as to the murder of peace officers and prison guards.

Quoted in People v. Velez, 88 Misc. 2d 378, 397 (Sup. Ct. N.Y. Co. 1976).

The new statute retained the same categories of crimes which triggered the possibility of a death sentence under the 1967 law: the murder of a police officer or prison guard, or any murder by a person serving a life sentence. L. 1974, c. 367. Although New York State had, for over a decade, punished these crimes not with a mandatory death sentence but rather with a discretionary sentence of life or death, the Legislature now made these crimes subject to mandatory death because of the erroneous assumption that Furman left it no constitutional capital punishment alternative.

The new mandatory death penalty statute did not remain intact for long. In People v. Davis, 43 N.Y. 2d 17, cert. denied, 435 U.S. 998 (1977), the New York Court of Appeals struck down virtually all

of Penal Law §125.27 because it failed to provide for individualized consideration of mitigating and aggravating factors. Davis, 43 N.Y. 2d at 33.

Following Davis, the New York Legislature began a series of unsuccessful attempts to repeal §60.06 and enact a guided discretion death penalty law. In each instance, the effort failed because Governors Carey and Cuomo, outspoken opponents of capital punishment, vetoed the bills. Thus, by an ironic historical accident, §125.27(1)(a)(iii) survives, despite the apparent wishes of the last several sessions of the New York State Legislature and the last two Governors of New York.[3]

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[3]Even prior to People v. Smith, there was a widespread belief among the general population and the legal community alike, that New York had no death penalty. For example, in one of this Court's most

(Footnote Continued)

As the most recent bill passed by the Legislature demonstrates, New York does not need, desire, or assume to be constitutional, the mandatory execution of so-called life-term prisoners who murder. Senate Bill 1300/Assembly Bill 1565, passed by the Legislature on January 18, 1983, and vetoed on March 10, 1983, would have retained the language of subsection (1)(a)(iii), but made it merely one of ten aggravating factors sufficient to trigger the possibility of a death sentence. The amendment would have established a

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(Footnote Continued)
recent capital punishment decisions, it referred to and listed the thirty-five states it believed to authorize executions--without reference to New York. Enmund v. Florida, 102 S.Ct. 3368 (1982), id. at 3372-73 and nn.5-11, id. at 3388-89, and nn. 35-39. Moreover, in the two most recent veto messages of Governors Carey and Cuomo, they have described the vetoed bills as attempts to "reinstitut[e]" and "reinstate" the death penalty. Veto messages of June 9, 1982 and March 10, 1983.

bifurcated sentencing proceeding and given the defendant wide latitude to present relevant mitigating evidence.

New York was the last jurisdiction in the country to authorize mandatory execution. All of the post-Furman mandatory statutes have been replaced by discretionary statutes and/or been declared unconstitutional by state courts.[4] The entire Nation has reaffirmed its earlier rejection of mandatory death sentences. No branch of New York's government disagrees. There is no need for this Court to now

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[4]Granting certiorari and reversing the New York Court of Appeals would disrupt the orderly administration of justice. In the years following Furman, this Court has constantly sought to "fine-tune" death penalty law, allowing the states to impose capital punishment while maintaining clear standards for the exercise of guided discretion. To permit a mandatory statute to stand will simply create new uncertainty and another generation of litigation in an area which has become somewhat regularized and predictable.

pass on a question that has been well-settled for so long.

II. EVEN IF A MANDATORY DEATH PENALTY STATUTE MAY BE CONSTITUTIONAL IN A NARROW CLASS OF CASES, PENAL LAW §125.27(1)(a)(iii) IS TOO BROAD, TREATING A LARGE NUMBER OF DISPARATE PERSONS AND CRIMES AS AN UNDIFFERENTIATED MASS.

Petitioner argues that certiorari should be granted because the New York Court of Appeals has declared unconstitutional the type of "narrow" mandatory statute that this Court has never passed upon. Pet. for Cert. at 13-18. It is true that this Court has reserved decision on the constitutionality of a mandatory statute which applies to "an extremely narrow category of homicide." Woodson, 428 U.S. at 287 n. 7. New York Penal Law §125.27(1)(a)(iii), however, is potentially applicable to a wide variety of offenders with different criminal histories, expectations of release, and psychological

profiles, who have committed homicide under very different circumstances.

The reservation expressed by this Court in Lockett, 438 U.S. at 604 n. 11 (1978); Roberts (H.), 431 U.S. at 637 n. 5; Roberts (S), 428 U.S. at 334 n. 9; Woodson, 428 U.S. at 287 n. 7; and Gregg v. Georgia, 428 U.S. 153, 186 (1976), that a life-sentenced inmate has nothing to lose by taking the life of another prisoner or guard, was premised on the assumption that the "lifer" was serving a term with no possibility of parole.[5] Graham v. Superior Court, 93 Cal. App. 3d 880, 887, 160 Cal. Rptr. 10, 14 (1979) ("What the Supreme Court was concerned with was the possibility no penalty other than death might be available for the life prisoner.

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[5]Even this reservation was omitted in the Court's most recent discussion of the matter. Eddings v. Oklahoma, 455 U.S. 104 (1982).

Where there is a possibility of parole, the state has available the postponement of the parole date as well as a harsher term of confinement.")

In New York, there is no sentence of life without parole. After serving the minimum term, with appropriate reductions for "jail time," an inmate is eligible for release. Under §125.27(1)(a)(iii), however, the death penalty must be imposed upon anyone convicted of intentional homicide who is serving a term of imprisonment of fifteen years or more to life. Thus, one "lifer" for §125.27(1)(a)(iii) purposes may be due for release in two days. Another might have fifteen more years to serve. Despite the obvious differences between the two, both would have been sentenced to death.[6]

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[6]In defending the constitutionality
(Footnote Continued)

Under New York's Penal Law, the imposition of a 15-to-life term is not infrequent. Conviction of any Class A-1 felony requires the imposition of at least such a term. In addition to murder, these felonies include arson, N.Y. Penal Law §150.20; kidnapping, id. at §135.25; conspiracy to commit any Class A felony with a person under 16, id. at §105.30; illegal sale of two or more ounces of any narcotic drug, id. at §220.34(1); illegal

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(Footnote Continued)
of §125.27(1)(a)(iii), Petitioner askes this Court to consider a hypothetical inmate, about to be released, who sexually assaults a guard, and then kills her so that she will not be a witness against him. Putting aside the Petitioner's implicit assumption that prison inmates are totally irrational animals, the hypothetical suggests a much narrower type of mandatory statute, thereby underscoring the breadth of §125.27(1)(a)(iii). In addition, the hypothetical fails to explain why a discretionary death penalty would not suffice as a deterrent, especially since murder to silence a witness, like murder by a "lifer," would be considered a powerful aggravating factor.

sale of 2,880+ milligrams of methadone, id. at §220.21(2); attempted first degree murder, id. at §110.05(1); attempted criminal possession of a controlled substance in the first degree, id.; and attempted criminal sale of a controlled substance in the first degree, id. In addition, under New York's persistent felony offender statute, N.Y. Penal Law §70.10, a 15-to-life term may be imposed upon a defendant convicted of three consecutive felonies, no matter what the felonies were.

Given the wide variety of offenses, many of them non-violent, for which a 15-to-life term may be imposed, and the obvious character differences between persistent check forgers, on one hand, and mass murderers, on the other, it is ludicrous to contend that all of these "lifers" who kill automatically deserve the same penalty. For example, an inmate

serving a 15-to-life term for passing three bad checks might kill an inmate in a prison fight. Another prisoner, serving a 15-to-life sentence for the torture-murder of two hundred children, might mastermind a prison breakout in which he kills several guards and civilians. In both cases, the death penalty would have to be imposed, because §§60.06 and 125.27(1)(a)(iii) presuppose that lifers who kill are an "undifferentiated mass" deserving of the same penalty. The failure to distinguish between very disparate offenses and offenders renders the statute unconstitutional.

III. PETITIONER HAS IMPLICITLY CONCEDED THAT NEW YORK PENAL LAW §125.27(1)(a)(iii) IS UNCONSTITUTIONAL

In continuing a tactic begun during pre-trial proceedings in 1981, Petitioner recounts Respondent's alleged criminal history, citing offenses for which Respondent was not indicted, tried, or

convicted, and making allegations that Respondent has never had an opportunity to rebut. Pet. for Cert. at ii-iii, 26-29. Following this litany, Petitioner conducts a brief, paper, "mitigation" "hearing," id. at 30, in which no mitigating factors are found, bizarrely entitles another recapitulation of Respondent's alleged criminal history as "Prognosis," id. at 31, and then concludes that no mitigating factors could possibly outweigh the aggravating factors. id.

This ex parte, paper "hearing" in which Petitioner plays prosecutor, defense, judge, and jury, indicates a central theoretical problem that petitioner has encountered in defending the constitutionality of §125.27(1)(a)(iii). To show that the statute is constitutional as applied to Respondent, Petitioner argues that Respondent's criminal background is so horrible that he would be

sentenced to death under any type of capital punishment statute. In so doing, Petitioner concedes the need to weigh aggravating and mitigating factors, but argues that this function should be left to the prosecutor, not to a judge or jury. Thus, it is clear that Petitioner relies on his view of Respondent's criminal background and character to argue for the death penalty. It is equally clear that Respondent must be given an opportunity to rebut these allegations and offer reasons as to why he should not be put to death.

Conclusion

For the foregoing reasons, the special prosecutor's petition for a writ of certiorari to the Court of Appeals of the State of New York should be denied.

Dated: New York, N.Y.
October 28, 1984

Respectfully submitted,

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84-355

Office - Supreme Court, U.S.
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CLERK

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

LEMUEL SMITH,

Respondent.

PETITIONER'S REPLY BRIEF

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§ 70.10 Sentence of imprisonment for persistent felony offender.

1. Definition of persistent felony offender.

(a) A persistent felony offender is a person, other than a persistent violent felony offender as defined in section 70.08, who stands convicted of a felony after having previously been convicted of two or more felonies, as provided in paragraphs (b) and (c) of this subdivision.

(b) A previous felony conviction within the meaning of paragraph (a) of this subdivision is a conviction of a felony in this state, or of a crime in any other jurisdiction, provided:

(i) that a sentence to a term of imprisonment in excess of one year, or a sentence to death, was imposed therefor; and

(ii) that the defendant was imprisoned under sentence for such conviction prior to the commission of the present felony; and

(iii) that the defendant was not pardoned on the ground of innocence.

(c) For the purpose of determining whether a person has two or more previous felony convictions, two or more convictions of crimes that were committed prior to the time the defendant was imprisoned under sentence for any of such convictions shall be deemed to be only one conviction.

2. Authorized sentence. When the court has found, pursuant to the provisions of the criminal procedure law that a person is a persistent felony offender, and when it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest, the court, in lieu of imposing the sentence of imprisonment authorized by section 70.00, 70.02, 70.04 or 70.06 for the crime of which such person presently stands convicted, may impose the sentence of imprisonment authorized by that section for a class A-I felony. In such event the reasons for the court's opinion shall be set forth in the record.

§ 400.20 Procedure for determining whether defendant should be sentenced as a persistent felony offender.

1. Applicability. The provisions of this section govern the procedure that must be followed in order to impose the persistent felony offender sentence authorized by subdivision two of section 70.10 of the penal law. Such sentence may not be imposed unless, based upon evidence in the record of a hearing held pursuant to this section, the court (a) has found that the defendant is a persistent felony offender as defined in subdivision one of section 70.10 of the penal law, and (b) is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct are such that extended incarceration and lifetime supervision of the defendant are warranted to best serve the public interest.

2. Authorization for hearing. When information available to the court prior to sentencing indicates that the defendant is a persistent felony offender, and when, in the opinion of the court, the available information shows that a persistent felony offender sentence may be warranted, the court may order a hearing to determine (a) whether the defendant is in fact a persistent felony offender, and (b) if so, whether a persistent felony offender sentence should be imposed.

3. Order directing a hearing. An order directing a hearing to determine whether the defendant should be sentenced as a persistent felony offender must be filed with the clerk of the court and must specify a date for the hearing not less than twenty days from the date the order is filed. The court must annex to and file with the order a statement setting forth the following:

(a) The dates and places of the previous convictions which render the defendant a persistent felony offender as defined in subdivision one of section 70.10 of the penal law; and

(b) The factors in the defendant's background and prior criminal conduct which the court deems relevant for the purpose of sentencing the defendant as a persistent felony offender.

4. Notice of hearing. Upon receipt of the order and statement of the court, the clerk of the court must send a notice of hearing to the defendant, his counsel and the district attorney. Such notice must specify the time and place of the hearing and the fact that the purpose of the hearing is to determine whether or not the defendant should be sentenced as a persistent felony offender. Each notice required to be sent hereunder must be accompanied by a copy of the statement of the court.

5. Burden and standard of proof; evidence. Upon any hearing held pursuant to this section the burden of proof is upon the people. A finding that the defendant is a persistent felony offender, as defined in subdivision one of section 70.10 of the penal law, must be based upon proof beyond a reasonable doubt by evidence admissible under the rules applicable to the trial of the issue of guilt. Matters pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct may be established by any relevant evidence, not legally privileged, regardless of admissibility under the exclusionary rules of evidence, and the standard of proof with respect to such matters shall be a preponderance of the evidence.

6. Constitutionality of prior convictions. A previous conviction in this or any other jurisdiction which was obtained in violation of the rights of the defendant under the applicable provisions of the Constitution of the United States may not be counted in determining whether the defendant is a persistent felony offender. The defendant may, at any time during the course of the hearing hereunder controvert an allegation with respect to such conviction in the statement of the court on the grounds that the conviction was unconstitutionally obtained. Failure to challenge the previous conviction in the manner provided herein constitutes a waiver on the part of the defendant of any allegation of unconstitutionality unless good cause be shown for such failure to make timely challenge.

7. Preliminary examination. When the defendant appears for the hearing the court must ask him whether he wishes to controvert any allegation made in the statement prepared by the court, and whether he wishes to present evidence on the issue of whether he is a persistent felony offender or on the question of his background and criminal conduct. If the defendant wishes to controvert any allegation in the statement of the court, he must specify the particular allegation or allegations he wishes to controvert. If he wishes to present evidence in his own behalf, he must specify the nature of such evidence. Uncontroverted allegations in the statement of the court are deemed evidence in the record.

8. Cases where further hearing is not required. Where the uncontroverted allegations in the statement of the court are sufficient to support a finding that the defendant is a persistent felony offender and the court is satisfied that (a) the uncontroverted allegations with respect to the defendant's background and the nature of his prior criminal conduct warrant sentencing the defendant as a persistent felony offender, and (b) the defendant either has no relevant evidence to present or the facts which could be established through the evidence offered by the defendant would not affect the

court's decision, the court may enter a finding that the defendant is a persistent felony offender and sentence him in accordance with the provisions of subdivision two of section 70.10 of the penal law.

9. Cases where further hearing is required. Where the defendant controverts an allegation in the statement of the court and the uncontroverted allegations in such statement are not sufficient to support a finding that the defendant is a persistent felony offender as defined in subdivision one of section 70.10 of the penal law, or where the uncontroverted allegations with respect to the defendant's history and the nature of his prior criminal conduct do not warrant sentencing him as a persistent felony offender, or where the defendant has offered to present evidence to establish facts that would affect the court's decision on the question of whether a persistent felony offender sentence is warranted, the court may fix a date for a further hearing. Such hearing shall be before the court without a jury and either party may introduce evidence with respect to the controverted allegations or any other matter relevant to the issue of whether or not the defendant should be sentenced as a persistent felony offender. At the conclusion of the hearing the court must make a finding as to whether or not the defendant is a persistent felony offender and, upon a finding that he is such, must then make such findings of fact as it deems relevant to the question of whether a persistent felony offender sentence is warranted. If the court both finds that the defendant is a persistent felony offender and is of the opinion that a persistent felony offender sentence is warranted, it may sentence the defendant in accordance with the provisions of subdivision two of section 70.10 of the penal law.

10. Termination of hearing. At any time during the pendency of a hearing pursuant to this section, the court may, in its discretion, terminate the hearing without making any finding. In such case, unless the court recommences the proceedings and makes the necessary findings, the defendant may not be sentenced as a persistent felony offender.

§ 450.10 Appeal by defendant to intermediate appellate court; in what cases authorized as of right.

An appeal to an intermediate appellate court may be taken as of right by the defendant from the following judgment, sentence and order of a criminal court:

1. A judgment other than one including a sentence of death;

2. A sentence other than one of death, as prescribed in subdivision one of section 450.30;

3. An order, entered pursuant to section 440.40, setting aside a sentence other than one of death, upon motion of the People.

PETITIONER'S REPLY

The New York statute under consideration (PL §125.27) is still in effect, unamended since Lemuel Smith was charged.[1] To argue, as the defendant does, that that statute is not in effect because the Court of Appeals in the case under review held that it violates the federal constitution is grossly misleading. New York does have a mandatory death penalty statute, by

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[1] The New York statute was amended in 1973 to not only make the penalty mandatory but also to severly limit the circumstances in which the penalty could be imposed. Prior to that a defendant could intend to kill any person and if he accidentally killed a police officer, face the death penalty. The statute also permitted imposition of the death penalty if the defendant acted recklessly with depraved indifference or the victim was a peace officer, a category significantly larger than that of police officer.

legislative enactment[2], and if this Court determines that that statute complies with federal constitutional mandates, an enforceable death penalty statute.

The defendant's contention that neither this Court nor the Governor of New York believes that New York has a death penalty

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[2] The Court of Appeals has never ruled on the issue of the constitutionality of the subdivision which mandates the death penalty for the intentional murder of a police officer in the performance of his duties. While the Court in dictum People v. Davis, 43 NY 2d 17, 400 NYS 2d 735, 371 NE 2d 456 (1977) clearly indicated its belief that that subdivision did not pass constitutional muster and the case is generally cited for that proposition, the court did not reach the issue, stating, "Accordingly, as to defendant Davis we conclude on nonconstitutional grounds that his guilt of murder in the first degree has not been established and thus do not reach the constitutional issue as to him". It was only as to the other subdivision under consideration, intentional murder of a correction officer in the performance of his duties, that the finding of unconstitutionality under the federal constitution applied.

statute is untenable. This Court's reference to the various death penalty statutes in the case cited by defendant, Enmund v. Florida, 458 US 782, 73 LEd 2d 1140, 102 SCt 3368 (1982), was in relation to the application of the death penalty to "general" homicides. The subsequent reference to the New York statute in Marshall v. Lonberger, ____US____, 74 LEd 2d 646, 103 SCt 843 (1984) as "a capital punishment statut(e) limited to precise categories of 'aggravated' murder" belies the defendant's contention (Stevens, J. dissenting ftnte 8).

In recent years, despite the Governor's stated opposition to the death penalty, the Legislature has attempted to reinstate the death penalty for a broad category of "general" murders. Each attempt has met with success by a wide margin but not by a margin wide enough to override

the vetos by the governors in question. It is to the application of the death penalty for "general" homicides which the governors referred.

Contrary to the defendant's contention, this Court has never intimated that a possible "lifer" exception was based upon the assumption that the life sentence was not subject to parole. The Louisiana statute provided for parole on a life sentence and it was in reference to that statute that this Court indicated that an exception might exist which would permit a mandatory death penalty. (Roberts v. Louisiana, 428 US 325, 49 LEd 2d 974, 96 SCt 3001 (1976), ftntes 3, 9; Roberts v. Louisiana, 431 US 633, 52 LEd 2d 637, 97 SCt 1993 (1977), ftnte 5).

The defendant argues that the New York death penalty statute would apply alike to a defendant who "kill(s) an inmate in a prison fight" and one who "mastermind(s) a pri-

son breakout in which he kills several guards and civilians" and that both would receive a mandatory sentence of death. In fact, based upon the facts stated, the first would not and the second might not. For the penalty to be applicable, the defendant must, inter alia, act "with intent to cause the death of another person" and acting with that intent "caus(e) the death of such person" (PL §125.27). Based upon the meager facts argued by the defendant, it is clear that the person who killed another in a fight did not act with that intent. The other facts alleged indicate an intent to breakout but not an intent to kill. If there was no specific intent to kill the victims, the New York death penalty would not apply. The New York statute applies to an extremely narrow set of circumstances.

The defendant's argument that offenders serving life sentences come from disparate criminal backgrounds and should be treated differently for intentional murders committed while incarcerated is not sound. The Legislature has determined that certain criminals should be sentenced to life imprisonment under certain circumstances for their criminal activity and that determination is presumed valid (Gregg v. Georgia, 428 US 153, 49 LEd 2d 859, 96 SCt 2902 (1976); People v. Davis, supra). The check forger, referred to by the defendant, committed three separate and distinct felonies (PL §70.10) and then had a hearing[3] at which aggravating and mitigating circumstances were considered and which closely paralleled those in jurisdictions

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[3] Unless he waived it.

which have a discretionary death penalty, after which the sentencing judge determined that "the history and character of the defendant and the nature and circumstances of his criminal conduct are such that extended incarceration and lifetime supervision are warranted to best serve the public interest" (CPL §400.20). A defendant may appeal as of right from such sentence.[4] (CPL §450.10)

The mass torture murder defendant referred to by the defendant would be, by any civilized standard, a person for whom a humane death penalty would be insufficient punishment. It is not, however, possible to

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[4] It is unlikely that a "simple" check forger would be sentenced to life. But if he were and the sentence affirmed, he would not be subject to the death penalty unless he commiteed an intentional murder, a fact which would prove that the trial judge acted properly in imposing the life sentence.

tailor a law to a single individual and no legislature could be expected to enact a constitutional law to fit the circumstance. The legislature has attempted to enact a discretionary death penalty law which would apply in a broad category of "general" murders but the enlightened governors have exercised their powers of veto. The legislature has thus provided that such crimes be punished by a mandatory life sentence. Like all other prisoners serving a sentence of at least 15 years to life, that defendant faces a mandatory sentence of death if he commits an intentional murder while serving that sentence.

Once serving a sentence of 15 years to life all prisoners over 18 who are convicted of intentional unmitigated murder face a mandatory death sentence.[5]

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[5] See: Penal Law §125.27 for other factors.

The distinction is rational and comports with constitutional mandates. The legislative determination must be accurate and the potential sanction effective as the defendant Lemuel Smith is the only prisoner in the State of New York currently facing the death penalty.

The petition for a writ of certiorari to the New York Court of Appeals should be granted.

Respectfully submitted,

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